State Action*

WILLIAM W. VAN ALSTYNE† AND KENNETH L. KARST‡

I. STATE ACTION AND THE NATIONAL INTEREST IN RACIAL EQUALITY

Not since the Civil War has the demand for racial equality pressed down on the national conscience so heavily as during this past decade. And not since the era of Reconstruction have the federal courts been called upon so frequently to establish constitutional standards for racial equality. The framing of the judicial response to this demand is doubly complicated. First, judges must construct acceptable substantive standards out of the magnificent ambiguities of the Civil War amendments. At the same time, they must reconcile the plea for a uniform national standard with the traditional limitation of the amendments—a limitation which confines constitutional guarantees to protection from abusive "state action" alone. Although these two objectives are indivisible, they are ordinarily treated as though they were separate; our purpose in this article is to identify the functions of the state action limitation, and to suggest a specific accommodation of those functions to the demand for racial equality.

Recent fashion requires the recitation of arguments in favor of a single national standard of racial equality. It is said that (a) the increased influence of Asian and African nations on world affairs requires that America's reputation abroad not be jeopardized by racial barriers to individual advancement at home; (b) the race problem has migrated with the Negro to the North and West, until it is no longer a regional concern but a national one; and (c) racial discrimination results in a waste of the nation's human resources which is intolerable at a time of external peril.

For our part, although we do not take issue with any of these rationalizations, we are prepared to recognize them as just that.[1] We are content to rest the case for national constitutional protection

---

* Because state action cases historically have tended to be concerned with racial equality (see text accompanying notes 2–5 *infra*) and because of the need to deal with the state action limitation in particular contexts, this article concentrates on selected aspects of the race problem. But we believe that the analysis is also useful in other state action contexts; hence the breadth of the title.

† B.A., University of Southern California, 1955; LL.B., Stanford University, 1958; Associate Professor of Law, The Ohio State University.

‡ A.B., University of California, Los Angeles, 1950; LL.B., Harvard University, 1953; Associate Professor of Law, The Ohio State University.

1. *Cf.* Cahn, *Jurisprudence*, 30 N.Y.U.L. REV. 150 (1955).

of racial equality on a belief, by no means uniformly supported by history, that freedom and security are unitary, and that the national conscience cannot be free so long as opportunity depends on the accident of skin color. We note also that a costly civil war was fought partly to secure the racial justice which, so their framers thought, the three Civil War amendments would protect for the future. We thus take the question of the nation's interest in racial equality as settled, both morally and historically.

What has particularly distinguished the racial equality cases from other civil liberties cases arising under the fourteenth amendment is their preoccupation with the state action limitation; indeed, most of the shifts in state action theory first made their appearance in the race cases. Historical explanations for this novel preoccupation are likely to be little more than guesses, but two may be suggested. (1) Other interests of a constitutional dimension have continually required protection from action which is easily identified as governmental. Those who struggle to protect free speech, for example, have their hands full with government; they have little spare time for the more sophisticated forms of private repression. As a consequence, the battle lines have formed around the substantive definition of the rights in question rather than the source of threats to the rights. In contrast, the substantive definition of racial equality has been settled at least to the point where those states inclined to discriminate against Negroes have recognized that they cannot succeed through legislation. Since racial discrimination as a straightforward state policy has been denied by the Constitution, there has followed a subtle but deliberate delegation of the enforcement of the policy to private hands. The legislative "repeal" of the common-law duties of innkeepers[2] is only one recent example of a time-tested practice elsewhere manifest in the history of voting rights.[3] On the level of constitutional doctrine, opponents of racial equality discovered early that if they were to succeed with reasoned argument, they had to address themselves to a subject on which they were likely to find adherents. The erosion of the "separate but equal" principle, visible long before 1954, required them to make their stand on the principle of the *Civil Rights Cases*.[4]

2. See note 124 *infra*.
3. See text accompanying note 49 *infra*.
4. 109 U.S. 3 (1883).

(2) Other constitutionally protected interests have found early and active support from within state governments, while the interest in racial equality has been virtually ignored by the states most seriously affected by racial problems. Mr. Justice Bradley seemed to assume, in his *Civil Rights Cases* opinion, that local responsibility would secure the same protection against racial discrimination as it did against other invasions of constitutionally protected interests.[5] The failure of this hope need not be recounted here; it will suffice to say that even a great judge is capable of that form of judicial lawmaking which proceeds from ignorance of a problem's factual setting to assumptions based on ignorance, and thence to the erection of constitutional principles based on the assumptions. The abdication of local responsibility for assuring racial equality has no doubt contributed to an increased willingness of the Supreme Court to offer protection in the form of national constitutional standards, applicable to more and more activities previously considered "private."

Whatever the explanation, the effort of the courts to give meaning to the fourteenth and fifteenth amendments has resulted in a variety of state action doctrines jutting out like the several unrelated heads of a hydra. Since the motivations for decisions to grant or withhold constitutional protection against various forms of quasi-private action are kept hidden, *ad hoc* decisions feed on themselves. The task is not simply to create constitutional doctrine which is coherent, but to reach sound results in concrete cases—results which give proper weight to the values embodied in the state action limitation.

II. An Approach to the Fourteenth and Fifteenth Amendments

In which of the following cases could the national authority intervene to provide some kind of remedy for the aggrieved Negroes?

Case 1: A private political association assists prospective white voters by advising them of registration deadlines and voting procedures; it refuses to provide such a service for prospective Negro voters.

Case 2: An impostor who has stolen a policeman's badge stops

5. 109 U.S. at 17.

a Negro, falsely accuses him of disturbing the peace, and then beats him severely.

Case 3: An independent gas station owner fires his only Negro employee and establishes a firm policy of not hiring Negroes.

Case 4: A homeowner permits white children to play on an adjoining lot, but refuses to permit Negro children to play there.

Each of these discriminatory policies might be the result of state legislation instead of a private decision. Thus, a state agency might be substituted for the private political association; a state law might provide civil and criminal relief from assault in general, but make an express exception for assaults on Negroes; a state law might forbid the employment of Negroes in gas stations; or a state law might forbid homeowners from permitting Negro children to use their property. In each of these cases, there would be a denial of constitutional rights which Congress, or the federal courts, clearly could redress.

In the present condition of constitutional doctrine, however, it is unlikely that section 5 of the fourteenth amendment or section 2 of the fifteenth would support federal legislation to provide relief in any of these cases, as originally described. The explanation which might be expected is not, for example, that "equal protection" has not been denied, but rather that no "state" has denied it. That the standard explanation is unsatisfactory is plain enough.[6] It is politically unsatisfactory because a "misleading search for 'state action' "[7] has spawned a host of theories which, taken literally or even seriously, cannot be applied generally. When a court quite sensibly refuses to apply its announced doctrine because that doc-

6. Much of what we say at this point has been said or implied before by a number of writers. Most writings to date have analyzed the various kinds of formal connections with government which may satisfy the state action requirement. *E.g.*, Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958); Barnett, *What Is "State" Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?*, 24 ORE. L. REV. 227 (1945); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Note, *State Action*, 1 RACE REL. L. REP. 613 (1956). Others have been more critical of the formulas themselves, without offering as a substitute any *generalized* identification of the interests which the state action limitation represents. *E.g.*, Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. PA. L. REV 933 (1952); Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935); Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627 (1946); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. CAL. L. REV. 208 (1957). Two exceptionally thoughtful studies of the "private government" problem are GELLHORN, AMERICAN RIGHTS ch. 9, especially pp. 192–95 (1960), and PEKELIS, LAW AND SOCIAL ACTION 91–128 (1950). The extensive literature of state action is noted in Lewis, *supra*.

7. See Horowitz, *supra* note 6.

trine does not meet the needs of the case at hand, it invites the criticism that it has abandoned principle for expediency.[8] Finally, the traditional state action doctrine is unsatisfactory as a guide for judicial action because it directs attention to formal questions instead of the real interests which compete for constitutional recognition.

Any proper discussion of the cases outlined above must therefore begin with recognition that the *state action* requirement is no more unitary than the requirement that *equal protection* has been denied. These verbal formulations are simply an awkward shorthand to describe a multiplicity of interests which compete for respect in each case. Among these interests are several which are functionally related to the presence or absence of participation by a government in the alleged constitutional invasion. Thus while the search for a merely formal connection—for "state action"—is misleading, the search for the values which stand behind the state action limitation is indispensable.

This search can be made more meaningful by recognizing three distinctive aspects of decision making under the fourteenth and fifteenth amendments. Their statement here in such embarrassing simplicity would be patronizing were it not for the Supreme Court's frequent success in obscuring them.

First: The identification of the personal interests of the parties affected by the incident which gave rise to the case.—It is assumed that individuals have some interests which governments lack. When a housewife chooses to do all her shopping at the A&P rather than at the corner grocery—for whatever reason or for no reason at all—she affects the business of both stores; but she also manifests an interest personal to herself, her freedom of choice. The protection of her freedom, even when it is used capriciously, is sufficiently important that the housewife is not to be subjected to any national standard of "reasonableness" in its exercise. Should the state legislature subsidize the A&P or tax the corner grocery, however, it cannot assert an equivalent personal interest to insulate its action from review according to a national standard of reasonableness. For unlike the housewife, the state is not an individual being whose personal interest in its own unrestricted freedom to choose is injured by confining it to certain national standards. Lacking a per-

8. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

sonal interest in the freedom of its own choice, the state must show justification for the effects of its activity on the interests of persons. In deciding whether certain conduct shall be subjected to national standards of reasonableness, it therefore becomes important to identify the particular parties and to identify those specific interests which are affected in some manner by the transaction in question. It will be seen, however, that recognition of these interests may not result from a search for state action based on formal connections with governments.

Second: The assessment of the impact on these personal interests which will result from a decision that the national authority—Congress or a court—is or is not free to intervene.—This is simply a restatement of the usual constitutional balance, focused narrowly on the question of the need for national intervention. Such a need may be great when a state government has participated formally in an invasion of a constitutionally protected interest, but it may be equally great when the invasion by private action is severe enough. This is not to say that constitutional guarantees should be applied wholesale to corporations or labor unions, but merely that under some circumstances the action of private groups sufficiently resembles governmental action to justify *federal* (not necessarily judicial) intervention.

Third: The assessment of the effect of such a decision on the policy of encouraging local responsibility.—Much of the attraction of a federal system lies in the value of decentralizing some administrative and policy-making functions. The language of state action in the Civil War amendments makes appropriate an explicit recognition of the values of federalism in the civil rights context.

Frank attention to these values, implicit in the shorthand of state action, should do much to promote a principled application of constitutional guarantees. The neglect of the values has resulted not from judicial bias but from a kind of verbal inertia, which often leads the Supreme Court to write broad doctrines which seem to foreclose a more particularized analysis. Since a narrower approach seems to us to be more helpful in the long run,[9] we shall treat separately, in several factual settings, the interests at stake—interests which compete for judicial protection under the misleadingly unitary label of state action.

9. See Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 82–86.

III. Freedom from Brutality

The Constitution traditionally has required a finding of some formal connection between the state and a person prosecuted or sued under federal statutes for acts of brutality,[10] since the statutes[11] are derived from section 5 of the fourteenth amendment. Bearing in mind that fourteenth amendment orthodoxy does not acknowledge a "right" of bodily integrity, but merely establishes a limited immunity from physical abuse by the "state," in which of the following cases could Congress provide relief for the victim?

Case 5: A police officer while on duty formally arrests a Negro for having violated a state law and then beats him severely.

Case 6: After making a formal arrest, an officer removes his badge, declares that he is no longer acting in the name of the law, and beats the Negro severely.

Case 7: A police officer while off duty presents his badge to a Negro, pretending to arrest him, and then beats him severely.

Case 8: An impostor who has stolen a policeman's badge stops

---

10. United States v. Harris, 106 U.S. 629 (1882); United States v. Powell, 151 Fed. 648 (N.D. Ala. 1907); Hodges v. United States, 203 U.S. 1, 14 (1906) (dictum); see United States v. Cruikshank, 92 U.S. 542, 555 (1875) (dictum). See also Civil Rights Cases, 109 U.S. 3 (1883), which, while not concerned with brutality, assuredly contributed more to the enigma of state action than any other cases.

11. With 18 U.S.C. § 241 (1958) having been held not to embrace fourteenth amendment rights, United States v. Williams, 341 U.S. 70 (1951), the principal criminal provision is 18 U.S.C. § 242 (1958); its efficacy, however, at least as viewed by one who now shares responsibility for enforcing it, is made doubtful by the *mens rea* standard required as a result of Screws v. United States, 325 U.S. 91 (1945). See Putzel, *Federal Civil Rights Enforcement: A Current Appraisal*, 99 U. Pa. L. Rev. 439, 450 (1951).

For a suggestion that the "willfulness" standard is not impossible, however, see Williams v. United States, 341 U.S. 97 (1951); Clark v. United States, 193 F.2d 294 (5th Cir. 1951); Crews v. United States, 160 F.2d 746 (5th Cir. 1947). See also the tantalizing words of Mr. Justice Frankfurter in Monroe v. Pape, 365 U.S. 167, 207 (1961) (dissenting opinion).

On the civil side, the principal statute is undoubtedly Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1958), since its reinvigoration in Monroe v. Pape, *supra*. See also Hardwick v. Hurley, 289 F.2d 529 (7th Cir. 1961). Rev. Stat. § 1980 (1875), 42 U.S.C. § 1985(3) (1958), was virtually discarded after Collins v. Hardyman, 341 U.S. 651 (1951), but the failure of local responsibility which was doubtless the compelling justification for the *Monroe* decision, *supra*, might also lead to a reconsideration of *Collins*.

The broad language of the Civil Rights Acts, together with their age—all were enacted against the background of the Civil War—has caused the federal courts to exercise caution in their application. See Freund, *Federal-State Relations in the Opinions of Judge Magruder*, 72 Harv. L. Rev. 1204, 1213–19 (1959); Note, *The Proper Scope of the Civil Rights Acts*, 66 Harv. L. Rev. 1285 (1953). Precedents among the cases interpreting these statutes should not be taken to mean that modern federal civil rights legislation would receive either a similarly narrow interpretation of their scope or a restrictive view of their constitutionality.

The judicial reception of the 1957 Civil Rights Act, 71 Stat. 634, 42 U.S.C. § 1975c (1958), as amended, 42 U.S.C. § 1975c (Supp. II, 1961), has been cordial, save in a few southern federal courts. See, *e.g.*, Hannah v. Larche, 363 U.S. 420 (1960); United States v. Raines, 362 U.S. 17 (1960). See also United States v. Alabama, 362 U.S. 602 (1960) (applying 1960 Civil Rights Act, 74 Stat. 86, 42 U.S.C. § 1971(c) (Supp. II, 1961)).

a Negro, falsely accuses him of disturbing the peace, and beats him severely. (This was our Case 2.[12])

Case 9: A private citizen stops a Negro without pretense of acting under color of law and beats him severely.

Case 10: A person who is drunk commits an assault upon another.

Given the standard characterization of the fourteenth amendment, one schooled in common-law notions of agency—which limit a principal's responsibility for the acts of his representative—would not suppose that federal law could constitutionally reach even Case 5 and certainly not Case 6 nor those that follow. As an agent for the state, the police officer has clearly exceeded the scope of his authority and has nominally violated the explicit orders of his principal, *i.e.*, he has violated the criminal laws and the constitution of the state.[13]

Where no other means of redressing the victim's grievance have appeared, however, the Supreme Court has extended the fourteenth amendment to avoid what would otherwise be an intolerable result.[14] But this doctrinal extension has been accomplished without any abandonment of the jargon of state action. Thus, if the language of the Court is to be believed, Case 9 cannot be reached by congressional legislation, notwithstanding justifications which are at least as urgent as those which exist in Cases 6 through 8. The same language suggests that Congress may or may not reach Cases 6 through 8 depending on considerations which seem insignificant in the constitutional context.

Troubled by the necessity of relating the formal requirement of state action to conduct by a state agency violative of state law, the Court has reasoned that a sufficient connection exists if "the wrong itself is *rendered possible* or is *efficiently aided* by the state authority *lodged in the wrongdoer.*"[15] Whether the "rendered pos-

12. Pp. 5–6 *supra.*

13. See Barney v. City of New York, 193 U.S. 430 (1904); Virginia v. Rives, 100 U.S. 313 (1879). See also Snowden v. Hughes, 321 U.S. 1, 17 (1944) (concurring opinion).

14. Screws v. United States, 325 U.S. 91 (1945); Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931); Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913); *Ex parte* Virginia, 100 U.S. 339 (1879); see Hale, *Unconstitutional Acts as Federal Crimes*, 60 HARV. L. REV. 65, 78–93 (1946). See also HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 825–33 (1953); Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627 (1946).

15. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 287 (1913). (Emphasis added.) See also Williams v. United States, 341 U.S. 97 (1951); United States v. Classic, 313 U.S. 299 (1941).

sible" or the "efficiently aided" formulation is to be used, presumably the actor must have been clothed by the state with some real or apparent authority which, by definition, he has abused. Thus, in the absence of some conduct by a state official which makes plausible an outsider's assumption that the actor has in fact been authorized to act for the state in some manner, the actor's conduct will not satisfy the state action requirement.

Under the formulations which have thus far come from the Supreme Court, then, Cases 9 and 10 appear to be beyond the reach of the fourteenth amendment, even supported by enforcing legislation. Cases 6 and 7 are within the state action lines drawn by *Williams v. United States*,[16] provided that the victim's belief in his oppressor's authority contributed to his failure to resist.[17] The main opinion in *Screws v. United States* may support a conclusion that there is state action in Case 8, because it equated "color of law" with mere "pretense" of law.[18] On orthodox analysis, however, Case 8 is doubtful. Should the power of Congress[19] to punish acts of brutality be limited along these lines? Is it sensible that Congress may

16. 341 U.S. 97, 100 (1951): "We need go no further to conclude that the lower court . . . was correct in holding that petitioner was no mere interloper but had a semblance of policeman's power from Florida."

17. Case 6 is fully analogous to Catlette v. United States, 132 F.2d 902 (4th Cir. 1943), in which a deputy sheriff went through the motions of "arresting" several Jehovah's Witnesses and then participated in beating them only after he "removed his badge . . . and stated in substance and effect 'What is done from here on will not be done in the name of the law.'" *Id.* at 904.

See also Crews v. United States, 160 F.2d 746, 750 (5th Cir. 1947): "An officer of the law *should not be permitted* to divest himself of his official authority in actions taken by him wherein he acts, *or purports, or pretends*, to act pursuant to his authority, and where one, *known by another to be an officer*, takes the other into custody in a manner which appears on its face to be in the exercise of authority of law, without making to the other any disclosure to the contrary, such officer thereby justifies the conclusion that he was acting under color of law in making such an arrest." (Emphasis added.) And see Koehler v. United States, 189 F.2d 711 (5th Cir.), *cert. denied*, 342 U.S. 852 (1951).

18. 325 U.S. 91, 111 (1945). See also the quotations in note 17 *supra*.

19. It is significant that the question is directed to the constitutionality of congressional acts which by clear and specific terms would provide the interpretation which Congress itself has given to the fourteenth amendment. The posture of such a case justifies greater self-restraint by the Court and greater deference to the liberal interpretation of the amendment, for "federal intervention as against the states is . . . primarily . . . for congressional determination in our system as it stands." Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954). For admitting that the burden is on those who would use federal laws, the representative nature of Congress and its sensitivity to local interests—guaranteed by the manner in which it is selected—justify greater deference to an interpretation of constitutional power against local interests than the Court might justify without the backing of Congress. *Id. passim*. "This is not to say that the Court can decline to measure national enactments by the Constitution when it is called upon to face the question in the course of ordinary litigation; the supremacy clause governs there as well. It is rather to say that the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process . . . ." *Id.* at 559.

punish the man who pretends to be a police officer but not the man who makes no such pretense, when in both cases the harm done may be equally severe and equally removed from any "authentic"[20] command of the state?

This highly fictionalized analysis is not required by a proper interpretation of the state action limitation. In fact such "standards" tend to draw the Court away from making inquiries which are relevant. The critical issue here may be the availability of local remedies to protect a racial minority from brutality; and although this consideration seems plainly to have influenced the Court, it remains unexpressed, submerged below the artificialities which dominate the opinions.

A. *The Personal Interests Involved*

Do the interests of the aggrieved class outweigh the interests of those adversely affected by protecting that class, so that Congress should be constitutionally free to extend some protection? The answer involves a value judgment, of course, but not one with respect to which many are likely to disagree. The interest of the Negro here is essentially in freedom from serious bodily harm, from pain and hurt. The interest is as elemental and precious as any we know. There is, however, a competing interest, and in this respect personal brutality may be distinguished from harms which are not accomplished by individuals, but only as a result of repressive state legislation. A legislature does not express a *personal* interest of its own; rather, it articulates a rule to express and enforce the collective personal interests of others who comprise some part of the body politic. To this extent it is easier to find state action in legislative acts than in acts committed by other state officials.[21] In our hypothetical cases, however, there is a personal interest involved, because the effect on the Negro is not the result of an impersonal statute, but it is an effect of another person's individual choice to act in a certain way. Significantly, this may be so whether or not the assailant is an officer. For unless the officer is acting under compulsion of law—as a ministerial automaton—what he does involves an assertion of his individual desires. The same is true of the person pretending to be an officer, and—more

20. See Snowden v. Hughes, 321 U.S. 1, 17 (1944) (concurring opinion); Screws v. United States, 325 U.S. 91, 147–48 (1945) (dissenting opinion); Raymond v. Chicago Traction Co., 207 U.S. 20, 41 (1907) (dissenting opinion).

21. See discussion at pp. 7–8 *supra*.

to the point—it is equally true of the assailant who makes no such pretense. To the extent that Congress prohibits the expression of these desires, it does limit the freedom of those who would otherwise choose to beat Negroes or anyone else. But such freedoms are also customarily limited by local civil and criminal remedies for assault; implicitly they rest on a judgment that the interest of some in freedom from molestation is greater than the interest of others who would express their feelings by molesting.

On balance, the interest in security from serious physical abuse is obviously to be preferred. There is no reason to deny to Congress the power to protect bodily integrity just because such protection impinges adversely on others. The point is, however, that this proposition is equally valid whether we are talking about brutality by police officers or brutality by "private" individuals. Since there is nothing to distinguish police brutality from private brutality (with respect to the personal interests affected by the use of national authority), there is no reason *on this basis* to invoke a state action distinction in describing or circumscribing federal power.

B. *The Impact of National Nonintervention on the Right of Bodily Integrity*

Should it appear that the Negro's interest in freedom from bodily harm is only rarely or lightly infringed by one class of persons, but more frequently and severely infringed by another, there might be reason to deny to Congress the power to reach the first group while enabling it to reach the second.[22] Where the private-state dichotomy accurately describes such a distinction, nothing is lost and something may be gained by use of the state action formula to help decide whether federal legislation is applicable or constitutional. But the assumption that a state action requirement serves to promote a distinction based on different degrees of impact should be re-examined for each class of cases. With respect to brutality, the assumption is unquestionably wrong and should not be used to foreclose federal protection of interests in freedom from bodily harm whether the harm comes from Case 5 or Case 9.

22. Prior to Monroe v. Pape, 365 U.S. 167 (1961), the lower federal courts interpreted REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958), substantially in this manner, so as to reach only recurring and systematic abuses by police against identifiable classes of persons. See, *e.g.*, Swanson v. McGuire, 188 F. Supp. 112 (N.D. Ill. 1960), for a brief discussion and reference to cases.

The assumption is unjustified because the private party in Case 9 may harm his victim just as much as the police officer in Case 5. How much harm he causes is the function of how strong he is, how well armed, and how malicious, and not whether he acts in the name of the law. On the quantitative side of the "impact" inquiry, there is no reason to assume that police officers are more likely to beat up Negroes than are private persons, even though the nature of their occupation may frequently bring them into contact with others under charged conditions tending to violence. Certainly the "private" brutality illustrated in Case 9 accounts for a greater number of serious infringements on bodily integrity than brutality accounted for by those few individuals described in Case 6, a case in which one federal court has already sustained the application of federal law.[23]

C. *Countervailing State Interests in the Treatment of Bodily Integrity*

The foregoing discussion has focused on the personal interests which may be affected by the scope of protection offered by the fourteenth amendment against private brutality with varying degrees of connection with official policy. We proceed now to consider some of the institutional interests which underlie the state action requirement.

1. *Congressional Power and Local Responsibility.* In Cases 5 through 10 above, there is no statement whether state law provides civil or criminal remedies to vindicate the victim's interest and to deter future wrongs of a similar character. Neither do the facts disclose whether such remedies are actually available to the victim, assuming, as we surely may, that the state legislature has nominally provided them as a matter of statutory law. Under the orthodox agency approach to state action, such facts might not even be considered relevant if it were otherwise clear that the brutality was caused by a private person not even pretending to act as a police officer. But the Supreme Court cannot help being influenced by information of this kind, and properly so, because it goes directly to considerations of local responsibility in the allocation of power between Congress and the states.

To sustain the validity of a federal statute which punishes acts of brutality committed by police officers or private individuals,

23. Catlette v. United States, 132 F.2d 902 (4th Cir. 1943), discussed in note 17 *supra*.

when it is clear that the state itself stands ready to vindicate the interest, may damage a valuable feature of our federal system. Such a course may discourage the local community from responding to local abuses, and it may unnecessarily induce increased reliance on the blunt instruments of central authority. Doubtless these considerations have served as a restraining influence on the Court's willingness to acknowledge congressional authority to act to protect even vital interests across the board.[24] This much is perhaps too obvious to merit restatement, but we think that the converse is equally obvious as a principle of fourteenth amendment construction; the maxim *cessante ratione legis, cessat et ipsa lex* serves the Constitution as well as it serves the common law.

Whether the application of federal law to protect a personal interest from serious abuse by others will adversely affect our common interest in promoting local responsibility, is an issue to be considered anew in each case. It is not enough to postulate a priori that to apply a federal law punishing acts of brutality *might* induce a laxity in the enforcement of local remedies, and thus to conclude that application of the federal law is unwarranted.[25] If the historic, uniform custom of the state has been to ignore serious crimes against a particular class of persons, may we not sometimes conclude that the community has abdicated its responsibility not from reliance on Congress, but from prejudice against the affected class?

The tragic history of Mack Charles Parker affords an example. In that case, a Negro in jail was seized and murdered by a mob of white men, some of whom were specifically identified in the ensuing investigation by the FBI. The FBI report was made available to an all-white Mississippi grand jury which, taking its lead from the local white prosecutor, refused to consider the FBI report and adjourned. The Justice Department considered prosecuting the case under section 242 of the Criminal Code, but initially decided

24. Strangely, however, the Court has occasionally used the growth of local responsibility to justify, rather than to forestall, constitutional intervention. In Mapp v. Ohio, 367 U.S. 643, 651 (1961), the Court relied on the states' trend to adopt the exclusionary rule as reason to extend the rule against all states by fourteenth amendment fiat. The majority was sharply admonished by Mr. Justice Harlan: "[T]he very fact on which the majority relies, instead of lending support to what is now being done, points away from the need of replacing voluntary state action with federal compulsion." *Id.* at 680 (dissenting opinion).

25. Thus, when Mr. Justice Frankfurter unsuccessfully urged that 18 U.S.C. § 241 (1958) should be restricted to obvious kinds of state action from apprehension that a contrary construction might "weaken the habits of local law enforcement by tempting reliance on federal authority," Screws v. United States, 325 U.S. 91, 149 (1945) (dissenting opinion), he appeared to assume too readily just what those "habits" really involved by way of adequate police protection for southern Negroes. Compare the concurring opinion of Mr. Justice Rutledge, *id.* at 114 & n.5.

against such a move because it could not tie in the local sheriff or his deputies as being sufficiently involved with the mob to satisfy the statute's requirement of state action.[26] A strict and formal interpretation of the state action principle thus insulated local irresponsibility, and perhaps even gave positive encouragement to further private brutality.

The Justice Department's inhibited use of section 242 is understandable, given the precedents under which it must work. But to refrain from prosecuting under such circumstances for the purpose of promoting local responsibility—and to do so by asserting that the state action requirement has not been satisfied—is to strain the limits of common sense. When an assumption of the kind indulged by Mr. Justice Bradley in the *Civil Rights Cases*[27] is inaccurate, it should not determine the result of the case.

Given such circumstances, Case 9 is really no different from Case 5. Case 10, involving a drunk who assaults another, may or may not be different, partly depending upon whether there is sufficient reason to believe that the victim can secure redress within the community. The inquiry will be the same in any of these cases, whether the victim is a Negro or not; the fact that he is a Negro is merely helpful in determining why he could not secure local relief, *i.e.*, whether relief was withheld because of local prejudice against members of his class. The resolution of the state action question would be equally affected by a refusal to vindicate the rights of a white person in a community where law enforcement was prejudicially administered by Negroes, or by local indifference to the rights of a Jehovah's Witness in a community where the law was the captive of patriotic zealots.

Suggesting this analysis, therefore, is not to maintain that the state action concept should be read out of the amendment for race cases, even though the analysis may support the application of fed-

26. N.Y. Times, April 26, 1959, p. 1, col. 7; *id.*, p. 47, col. 4; *id.*, April 27, 1959, p. 1, col. 2; *id.*, May 26, 1959, p. 20, col. 3; *id.*, Nov. 18, 1959, p. 1, col. 4. On reconsideration, in view of the irresponsibility of the Mississippi local grand jury, the Justice Department altered its earlier decision not to prosecute the case and did convene a federal grand jury in Mississippi. *Id.*, Jan. 4, 1960, p. 1, col. 5. The charge of the presiding judge made it clear that some connection between the lynch mob and a state official would have to be established, *id.*, Jan. 5, p. 12, col. 4, *id.*, Nov. 6, 1959, p. 18, col. 4 (noting the state action problem), and ultimately even the federal grand jury was unable to return a true bill. *Id.*, Jan. 27, 1960, p. 19, col. 3.

27. 109 U.S. 3, 17, 24 (1883): "[The Negroes'] rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress . . . [these rights are] properly cognizable by the laws of the State, and presumably subject to redress by those laws . . . ."

eral law to some private brutality. When the community discharges its responsibility by applying local remedies in an equal-handed fashion on behalf of all who are brutalized, there is reason to respect the state's responsibility and to encourage it by withholding federal intervention. Thus not all private abuses, even of Negroes, would result in the automatic availability of federal remedies.

We cannot, of course, ignore the difficulties in determining whether local government has discharged its responsibilities in such a manner that federal authority ought to be withheld. Most assuredly, a constitutional distinction of the kind proposed will require careful inquiry in each case by the federal courts and by the Justice Department. Consider the following situations surrounding the murder of a Negro by a white man who made no pretense of acting under color of law:

One. Traditionally and throughout the state no effort has been made to identify, arrest, prosecute, or punish murderers of Negroes, and this custom is practiced in this case as well.

Two. Traditionally, such offenders have been punished in most of the state, but such offenders are not punished in this county and the local practice is followed in this case.

Three. Traditionally, such offenders have been punished, but in this case the local police have done nothing for eight months when the Justice Department is asked to intervene.

Four. The local police conduct a full investigation and turn over evidence warranting prosecution to a local grand jury which ignores the evidence and returns no true bill.

Five. The grand jury indicts but the petit jury acquits, notwithstanding an overwhelming case established by the prosecution.

Six. The petit jury convicts, but the judge imposes the lightest sentence permissible under state law, contrary to sentences uniformly handed down in cases different only in that Negroes were not the victims.

Given any of these assumptions, there should be no necessary obstacle to a federal prosecution of the offender. But they are assumptions, stated in the easy manner of all hypothetical cases. In a flesh-and-blood case the federal judge cannot escape deciding on the basis of meager evidence whether such a failure of local responsibility has taken place. This determination is necessary in order to satisfy the constitutional requirement of state action. Even

so, the task is no greater than what is asked of courts at the present time, nor is it any more difficult than the illogical state action inquiry which the *Screws* opinion demands. The difference is that the inquiry responds to the reasons for retaining a state action limitation.

The alteration proposed to the Court's approach to state action could be accomplished fairly easily within the framework of existing constitutional theory. Mr. Justice Frankfurter was disturbed in *Snowden v. Hughes*[28] by a suit in which it was alleged that election canvassing board officials had violated their duties under state law by failing to certify the plaintiff's nomination: "I am unable to grasp the principle on which the State can here be said to deny the plaintiff the equal protection of the laws of the State when the foundation of his claim is that the Board had disobeyed the *authentic* command of the State."[29] The point was well taken if the board had indeed disobeyed the state's *authentic* command, but it loses its force if the Court is free to determine for itself whether the ostensible command is authentic. If the state makes a declaration of policy through its legislature, but systematically pursues another policy through the willful practice of its executive not to apply the law, the mere appearance of that law can scarcely be considered the authentic command of the state, any more than if the legislature itself had written a "Negro exception" into the statute. The point has been made elsewhere that the state may be considered to have adopted the action of the private citizen as its own to the extent that it resolves to withhold otherwise available local remedies.[30]

---

28. 321 U.S. 1 (1944).

29. *Id.* at 17. (Emphasis added.)

30. The proposition is implicit in the state "inaction" cases, *e.g.*, Lynch v. United States, 189 F.2d 476 (5th Cir. 1951); Picking v. Pennsylvania R.R., 151 F.2d 240 (3d Cir. 1945), *cert. denied*, 332 U.S. 776 (1947); United States v. Given, 25 Fed. Cas. 1324 (No. 15210) (D. Del. 1873), although these involved actions only against readily ascertainable state officials and not against private citizens. The case of Brewer v. Hoxie School Dist., 238 F.2d 91 (8th Cir. 1956), went quite far in granting injunctive relief against private interference partly on the basis of an *affirmative* responsibility of the state to provide equal protection which national power could be used to vindicate. The dicta in the case are broad. See 70 HARV. L. REV. 1299, 1300 (1957); 43 VA. L. REV. 255, 257 (1957).

Of great interest are the writings of Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627, 638 (1946): "Let us make the improbable assumption that some state legislature passed a statute repealing the law against homicide in so far as it affects lynching. By enacting such a statute, the state has potentially deprived persons of life. If lynching can be stopped, however, the potential deprivation will not ripen into an actual one. . . . Legislation . . . which makes the lynching a federal crime, or which authorizes federal authorities to prosecute it in federal courts as a crime under state law as it was before the enactment of the unconstitutional statute, would tend to prevent the state's act in withdrawing the protection to life from becoming an actual deprivation of life. It is hard to see how it can

The thought is implicit, of course, in Mr. Justice Bradley's treatment of the *Civil Rights Cases*; he presumed the availability of local remedies but left open the question whether even private wrongdoers would be beyond the reach of the fourteenth amendment if the custom of the state were to withhold relief.[31] Similarly, though the state may maintain homicide statutes on its books, a decision by a state official not to apply those statutes *because a Negro is the victim* is a decision by the state to cloak the oppressor's act with the state's permissive authority.[32] Thus the impact of private action on the interest of the aggrieved class, combined with a discriminatory withholding of local law enforcement protection, justifies the application of federal law. The demonstration of official local irresponsibility overcomes our initial hesitancy to extend the reach of central authority, because our initial confidence in local justice was misplaced.

2. *Congressional Power and Local Prerogative.* It may be suggested that our approach assumes a too-restricted view of the value of local prerogatives in federalism. The implication has been, perhaps, that the local community should be left free to manage its own affairs only to the limited extent of selecting and applying a

---

be denied that such federal legislation would be appropriate for the enforcement of the [fourteenth] Amendment.

"It might be argued that it is not the lynchers but the state that violated the Amendment. To this it might be replied that the lynchers . . . were in fact violating the Amendment by bringing to fruition *the state's* potential deprivation."

Compare the language from *Ex parte* Riggins, 134 Fed. 404, 409 (N.D. Ala. 1904) (United States v. Powell, 151 Fed. 648 (N.D. Ala. 1907) said *Riggins* was overruled by Hodges v. United States, 203 U.S. 1 (1906)): "The power of Congress under the [fourteenth] amendment, as to the performance of the duty thus enjoined upon the state, has therefore a twofold aspect. The first concerns the right to interfere with state laws or state power. That can be done only when the state is at fault—when the state either refuses to afford due process of law, or its officers refuse to execute the laws, or execute them with vicious purpose or uneven hand. Then, and not until then, can federal power step in and displace or alter state laws, or interfere with state officers. Then the interference with state law or power must be confined to dealing with the particular evil, and to providing an effective cure for it. The other phase of the power concerns the protection of the rights which the amendment gives, though the state may not be at fault, and the power of Congress to aid the state, in the performance of its duty, by removing obstruction or resistance, by private lawlessness, to the successful performance of the duty."

United States v. Given, *supra* at 1327: "Suppose, as is largely the case in Delaware, the state passes no unfriendly act, but neglects to impose penalties upon its election officers for making discriminations on account of race or color, and provides no remedy for such wrongs, of what value is the constitutional provision unless it means that congress may interfere? I think such intervention was contemplated and expressly authorized."

See also United States v. Hall, 26 Fed. Cas. 79, 81–82 (No. 15282) (S.D. Ala. 1871); Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958); Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME LAW. 303 (1959).

31. See Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149, 183–88 (1935).

32. See *ibid*; note 30 *supra*.

local remedy for the protection of nationally established values; if it does not, then it leaves itself open to federal intervention. An objection may be made that a living system of federalism must leave other, more significant choices to the local community; under such a system the states are free to decide whether some interests should be protected at all, in view of competing interests which would be denied protection. Should the equal protection clause, for example, operate so as to coerce the states to protect *all possible* interests in bodily integrity, even, say, freedom from the negligent infliction of emotional distress? Or should the rule be that if the community observes a standard of uniformity in leaving an interest unprotected, Congress cannot override its determination?

Suppose the local decision is that no person has a sufficient interest in being free from bodily contact which is not harmful but only offensive, in view of the competing interest in freedom of action. Such a local decision is worthy of respect precisely because there is value in decentralizing the power to make such choices of community policy. Where a community has found it advisable to deny relief to everyone—*not just to Negroes*—for such forms of bodily contact, has there been the kind of abdication of local responsibility as constitutionally to support federal legislation? We think the answer must be "No," subject to a qualification.

If the failure to provide any local remedy is in fact a disguised attempt to deny a remedy only to a disadvantaged class, and not simply a community withdrawal of protection based on its view of the relative importance of the competing personal interests at stake, there is less reason for respecting the local decision. The interest of Negroes in freedom from offensive bodily contact is in the first instance no greater than the similar interest of all other persons, but it may be that in some communities Negroes in particular will be likely to be subjected to such indignities if the state remains aloof. If it is clear that the lack of a local remedy is attributable to legislative endorsement of this practice, the situation is not substantially different from what it would be if the state were to provide civil and criminal remedies for offensive-contact batteries, but refuse to enforce them in behalf of Negroes. On this assumption, the application of federal relief would be justified; the real problem is of course the determination that it is this phenomenon which accounts for the lack of a local remedy. Such a determination would perhaps be harder to make in the case of repeal

of legislative protections against offensive-contact batteries than in the case of legislative abolition of the common-law duties of innkeepers,[33] or of state primary election laws,[34] but it would not be an impossible one.[35] Given a determination by the federal court that state-law remedies have been abolished for the purpose of "delegating" racial discrimination to private individuals or groups, there should be no difficulty in the way of treating the state's legislative action as the equivalent of official adoption of the private discrimination.

The local prerogative to determine which interests are worthy of legal protection should be recognized through application of the state action requirement, but only when the local determination is made for purposes which are constitutionally legitimate. There should be no judicial respect for exercises of local prerogative which are simply disguises for racial discrimination. This conclusion, we concede, rests on the assumption that distinctions *in law enforcement policy* which are based on race alone are not constitutionally legitimate, an assumption for which there is ample support in the opinions of the Supreme Court. If it be argued that the suggested analysis requires the courts to examine into the purposes and effects of legislative action and inaction, the easy answer must be that such an examination is hardly new. From the "grandfather clause" cases[36] to the recent realignment of the borders of Tuskegee, Alabama,[37] the Supreme Court has often concerned itself with legislative purpose,[38] however vigorously it may protest the con-

---

33. See note 124 *infra*.

34. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1941); Nixon v. Condon, 286 U.S. 73 (1932); Perry v. Cyphers, 186 F.2d 608 (5th Cir. 1951); Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948); see text accompanying note 49 *infra*.

35. See cases cited notes 36–38 *infra* and the discussion of Hale, note 30 *supra*.

36. Lane v. Wilson, 307 U.S. 268 (1939); Myers v. Anderson, 238 U.S. 368 (1915); Guinn v. United States, 238 U.S. 347, 363–64 (1915). "The restrictions imposed must be judged with reference to those for whom they were designed." Lane v. Wilson, *supra* at 276.

37. Gomillion v. Lightfoot, 364 U.S. 339 (1960); see 22 OHIO ST. L.J. 213, 218 nn. 39, 41 (1961).

38. See, *e.g.*, Shelton v. Tucker, 364 U.S. 479 (1960); Talley v. California, 362 U.S. 60 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); Korematsu v. United States, 323 U.S. 214 (1944); Truax v. Raich, 239 U.S. 33, 40 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886). For recent lower federal court decisions expressly acknowledging the significance of legislative purpose in characterizing the effects of minority-oriented statutes, see St. Helena Parish School Bd. v. Hall, 287 F.2d 376 (5th Cir. 1961); Baskin v. Brown, 174 F.2d 391, 393 (4th Cir. 1949); Rice v. Elmore, 165 F.2d 387, 388, 392 (4th Cir. 1947); Taylor v. Board of Educ., 191 F. Supp. 181, 6 RACE REL. L. REP. 90 (S.D.N.Y.

trary.[39] Courts cannot avoid considering the purpose of legislation if they are to perform the balancing operation which is at the heart of all constitutional lawmaking. When a court weighs a legislative objective against its cost to other constitutionally protected interests, the balance ought to be struck on the basis of the court's view of the real objectives of the legislation, and not simply the declarations of noble purpose which appear in its preamble.

IV. Voting

The constitutional interest in equality in the political process is undoubtedly high. If a guarantee of racial equality means anything, it must mean that one's race cannot disqualify him from participating effectively in the election of officials who make community decisions which bind him. Particularly in an era of positive government the interest in voting is basic, because the exercise of the vote can help to secure the community's consideration of the voter's other interests. Where Negroes do not vote, politicians are not notably concerned with their education, housing, employment, recreation, or even their treatment by the police. It is thus no solution to say that Negroes can be protected by the courts from unconstitutional invasions of their interests at the hands of officials chosen in all-white elections. For one thing, the failure to secure positive benefits for the Negro community, such as road repairs, new parks and the like, is not within reach of the judiciary. Furthermore, state-court judges are chosen in the very elections with which we are now concerned. Recognition of the importance of voting to the advancement of Negro interests led to the adoption of the separate and highly specific fifteenth amendment rather than

---

1961); Bush v. Orleans Parish School Bd., 188 F. Supp. 916, 927, 929, 5 Race Rel. L. Rep. 1008, 1013, 1024–25 (E.D. La. 1960), *enforced*, 194 F. Supp. 182, 6 Race Rel. L. Rep. 413 (E.D. La. 1961); Wiley v. Richland Water Dist., 5 Race Rel. L. Rep. 788, 790 (D. Ore. June 30, 1960). See also Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 Calif. L. Rev. 104, 115–21 (1961). For a wholly unsatisfactory discussion, see Howell, *Legislative Motive and Legislative Purpose in the Invalidation of a Civil Rights Statute*, 47 Va. L. Rev. 439 (1961). For an excellent review of this issue, see Gomillion v. Lightfoot, 270 F.2d 594, 606–11 (5th Cir. 1959) (dissenting opinion), *rev'd*, 364 U.S. 339 (1960).

39. See, *e.g.*, United States v. Kahriger, 345 U.S. 22 (1953), and cases cited in Howell, *supra* note 38. A comparison of the two lines of cases, *i.e.*, those in which the Court has been reluctant to review legislative purpose and those in which it has clearly done so, may suggest that its reluctance is largely directed toward sustaining *federal* statutes concerning powers of *Congress*; this aspect of judicial self-restraint or abstention may not be supported by similar considerations in reviewing *state* laws affecting the civil liberties of disadvantaged minorities. Is part of the reason explained by the discussion in note 19 *supra*?

reliance on the broader language of the fourteenth,[40] and the indirection of its section 2.[41]

Further, there is no substantial and legitimate countervailing interest in keeping Negroes off the voting rolls. Arguments based on the lack of education of many southern Negroes are easily met by noting that the states may set their educational qualifications high, so long as they enforce the same qualifications against all would-be voters. And the notion that white voters will somehow protect the Negroes' interests is as false in fact as it is incompatible with the democratic theory which confides to each man the opportunity to represent himself through his ballot.

It may be suggested that such questions of justification for keeping Negroes out of elections were settled by the fifteenth amendment itself. But the white primary cases raise surprising considerations of justification based on the freedom to associate for political purposes. The logical starting point is the case of *Terry v. Adams*,[42] which held that the Jaybird Democratic Association's exclusion of Negroes violated the fifteenth amendment.

Four Justices agreed that "Not every private club, association or league organized to influence public candidacies or political action must conform to the Constitution's restrictions on political parties." But, they said, "when a state *structures* its electoral apparatus in a form which *devolves* upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play."[43] How did the State of Texas "structure" its electoral apparatus? By doing nothing; by permitting the Jaybirds to run a pre-primary election to determine the candidates the Association would support in the Democratic primary which followed. How did this failure to act "devolve" upon the Jaybirds the choice of officials? There was a fifty-year history of Jaybird domination of county elections, virtually unopposed by

40. Professor Pollak has written persuasively concerning the special implications to be drawn from this distinction. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 19–23 (1959). See also MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 20–22 (1909).

41. This section authorizes (in terms which seem "mandatory") the reduction of the representation of a state in the House of Representatives by the proportion of male citizens over the age of twenty-one in the state who are denied the right to vote in federal or state elections. The Congress has never made such a reduction. See Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108 (1960).

42. 345 U.S. 461 (1953).

43. 345 U.S. at 482, 484 (opinion of Clark, J.). (Emphasis added.)

other candidates. When a private election of this kind was the only one which counted, then state action was to be found in mere permission for the election to be held.

Three other Justices apparently would not require the element of domination by the private group, so long as its election was directed at the selection of public officers or the decision of public issues: "For a state to *permit* such a duplication of its electoral processes is to *permit* a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment."[44]

In many another context the Court had given constitutional dimension to the claim of freedom of association; by ignoring the claim in the *Terry* case, the Court invited Professor Wechsler's criticism that it had given protection to some kinds of association for unacceptable purposes but not to others, without demonstrating that it had made a principled selection.[45] In reply, Professor Pollak has argued that the fifteenth amendment, with its separate and explicit guarantee of racial equality in voting, may be read without any state action limitation; or, alternatively, that the state has a positive duty to protect the effectiveness of Negro voting, and that the failure to perform that duty is sufficient state action to justify application of the amendment.[46] This reply furnishes a principle, but one which seems too broad. If the state action limitation is to be dropped from the fifteenth amendment, should not Case 1 above[47] (the case concerning registration advice by a private association to whites only) be decided against the political party? And if, as we believe, the private conduct in Case 1 is not reachable under the fifteenth amendment, is not the participation of the state the key element which is missing?[48]

---

44. 345 U.S. at 469 (opinion of Black, J.). (Emphasis added.)

45. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

46. See Pollak, *supra* note 40.

47. P. 5 *supra*.

48. It may be said that the missing element is the denial of the right to vote, and that the only arguable constitutional invasion is a denial of equal protection under the fourteenth amendment. But the terms of the fifteenth cover not only denial of the right to vote, but its *abridgment* as well. It would be unfortunate to limit the fifteenth amendment to cases of interference with the physical casting of ballots by Negroes. See United States v. Classic, 313 U.S. 299 (1941). The right to vote generally includes the right to be free from impediments which render the registering of one citizen's choice more difficult than that of others. See United States v. Stone, 188 Fed. 836 (D. Md. 1911). Dilution of one's vote by stuffing ballots is an abridgment. See United States v. Saylor, 322 U.S. 385 (1944); Prichard v. United States, 181 F.2d 326, 331 (6th Cir. 1950) (alternative holding); Ledford v. United States, 155 F.2d 574 (6th Cir.) (dictum), *cert. denied*, 329 U.S. 733 (1946). For altering or failing to count ballots, see United States v. Mosley, 238 U.S. 383 (1915); United States v. Wilson, 72 F. Supp. 812 (W.D. Mo. 1947), *aff'd sub nom.* Klein v. United

To find our way out of this box it will be helpful to recall the functions which the state action requirement performs, and to test the facts of *Terry v. Adams* against them. First, not only was there no showing that the state had acted responsibly to assure Negroes an effective participation in the vote, but there was a long history of calculated irresponsibility. While the decision that the state had "denied" the right to vote should probably not rest on the fact that the state had moved from official sponsorship of a white primary to its then-present status as onlooker, it would be unrealistic to assume that the Court paid no attention to the history of Negro voting in Texas.[49] Since the interest in preserving local responsibility was thus much diminished, an application of the state action limitation would have to be supported on other grounds.

The impact of the Jaybirds' scheme on the constitutionally protected interest—racial equality in voting—was immense, since the scheme deprived every Negro in the county from having his vote count as effectively as a white voter's. So the only remaining important consideration was the justification argument raised by the Jaybirds' claim to freedom of association. Of course the State of Texas would have no legitimate interest of its own in preserving the integrity of a political party, but the Jaybirds' claim may not be so lightly dismissed. Must every political combination admit to its counsel everyone who seeks admission even though some of the applicants hope to sway the combination from its chosen purpose?

Terry v. Adams need not be read so broadly. It may be taken as an affirmation that an asserted justification based on freedom of association is not legitimate when the immediate objective of the association is the denial of the opportunity for potential voters—here the Negroes—to have their votes count on the one-man-one-vote basis which forms the heart of our democracy.[50] The freedom of association, as justification for the Jaybirds' arrangement, thus stands on little better footing than would the freedom to associate for the purpose of stuffing ballot boxes.

States, 176 F.2d 184 (8th Cir.), *cert. denied*, 338 U.S. 870 (1949); United States v. Clark, 19 F. Supp. 981 (W.D. Mo. 1937).

49. The State of Texas had previously been frustrated in its efforts to limit voting of Negroes by the devices of a statutory prohibition on Negro voting in the Democratic primary, Nixon v. Herndon, 273 U.S. 536 (1927), and a statutory delegation to the party's state executive committee of power to fix qualifications for party membership, Nixon v. Condon, 286 U.S. 73 (1932). The fixing of a racial qualification by the party's state convention received the Supreme Court's blessing until Grovey v. Townsend, 295 U.S. 45 (1935), was overruled by Smith v. Allwright, 321 U.S. 649 (1944).

50. Mr. Justice Black's opinion emphasizes strongly the Jaybirds' purpose to deny Negroes an effective vote. 345 U.S. at 463–66.

This analysis supports the application of the fifteenth amendment to persons who retaliate against Negro voters by means of an economic boycott.[51] The immediate aim of such an association, or expression, is a denial of the vote itself, an aim which is not entitled to weight in the constitutional balance. The result suggested extends the fifteenth amendment beyond the range of presently accepted state action formulas; it does not, however, betray the constitutional values which the state action limitation is designed to protect.

The same reasoning would govern the case of a religious party, a case which troubled Professor Wechsler because of its strong appeal to the freedom of expression.[52] Once such a party becomes dominant—in the sense that the Jaybirds were dominant—then its pre-primary election cannot be closed to voters of other faiths without denying them their effective political say. Such a suggestion may be disturbing to some, or even startling, but it is not new. In its strong protection of the right of minority interests to make themselves felt in the political process, *Terry v. Adams* itself is only a latter-day echo of Mr. Chief Justice Stone's famous footnotes.[53]

Then are we to infer that the state action requirement will be ignored in Negro voting cases, or that the requirement will be held to be satisfied whenever the state fails to prohibit private action which has a racially discriminatory effect on voting strength? Not at all. If the facts of Case 1, above, do not violate the fifteenth amendment, the absence of some element which accounts for the state action limitation makes the constitutional difference. It is not to be found in the degree of the state's formal participation, how-

---

51. *Cf.* United States v. Beaty, 288 F.2d 653 (6th Cir. 1961), enjoining landowners from threatening economic reprisals against Negro sharecroppers for the purpose of interfering with their voting. The injunction was based on the portion of the 1957 Civil Rights Act which is derived from congressional power over *federal* elections, 71 Stat. 637 (1957), 42 U.S.C. § 1971(c) (1958). See also Comment, *Judicial Protection of Minority Voting Rights: The Case for Constitutional Reform*, 22 OHIO ST. L.J. 390, 394, 411 (1961).

52. Wechsler, *supra* note 45, at 29. Of course, protection against religious or other nonracial discrimination in voting would be based on the fourteenth amendment, not the fifteenth.

53. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *cf.* South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938); Southern Pac. Co. v. Arizona, 325 U.S. 761, 767 n.2 (1945).

At least one writer is prepared to go all the way with the hierarchy-of-values approach, abandoning state action altogether as a prerequisite to the protection of "matters of high public interest." See St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection, and "Private" Discrimination*, 59 MICH. L. REV. 993, 1010–11, 1016 (1961).

ever, for here, as in *Terry*, the state is a bystander. Rather the distinction rests on the other interests at stake. In *Terry v. Adams*, Negroes were excluded entirely from the county's only meaningful election; in Case 1 there is no exclusion of Negroes from voting, but only a denial of a convenience which will assist them in voting. Furthermore, there is a legitimate justification based on the freedom of political association and expression of the persons who have formed the private association; this association does not have as an immediate objective the closing of the election to Negroes. This distinction, we admit, rests squarely on an assumption of democratic principle: it is permissible to minimize your opposition's electoral strength by winning adherents who will support you at the polls, but it is not permissible to achieve the same result by preventing the opposition's votes from being counted fairly. A similar assumption underlies the first amendment's reliance on more speech as our chief protection against bad speech.

Case 11: If the state is substituted for the political party in Case 1, the impact on the Negroes' interest in voting is the same, but there is no countervailing interest in political expression on the part of the state. Further, the inference of local irresponsibility is strong.

Case 12: Now the political party which offers voting information also provides transportation to the polls and other services, so that the party's candidates always win. The party's dominance suggests an analogy to *Terry v. Adams*, but the analogy is not perfect. *The Negro's constitutionally protected interest is not the interest in winning the election, but in having his vote counted with the same weight as the vote of any other individual.* Thus the impact of the political party's conduct on that interest does not differ significantly from the impact in Case 1.

It will be seen that this approach suggests the possibility of some results which may be unpalatable on the basis of the current doctrinal emphasis on the need for some formal action by the state. Thus, if a single white man kidnaps a single Negro and keeps him away from the polls on the day of a state election, the impact on the Negro's interest in voting is every bit as severe as that in *Terry v. Adams*, although it is limited to one man.[54] And the justification for the kidnaper's conduct is even less substantial and less legitimate

54. Such physical coercion, however, may also have intimidating effects on the whole Negro community.

than the Jaybirds' justification. The only remaining reason for withholding an application of the fifteenth amendment (for example, by way of prosecution under the Federal Civil Rights Acts) is embodied in the principle of local responsibility. But should the local community fail to discipline the kidnaper, it seems to us reasonable that the national authority should be free to intervene.[55]

V. Education

The need for imposing the requirements of equal protection on private schools is far from pressing, for two reasons. Outside the South, most of these schools and virtually all those which are particularly sought after because of their reputation have shown little disposition to exclude Negroes. Furthermore, the interest of most Negroes in private education is now indeed academic, because high costs erect a barrier nearly as severe as the racial barrier. Substantial integration in private education will have to wait until desegregation in employment and in public education provides the means for Negroes to attain higher economic status.

Most states have taken no official interest in the racial composition of the student bodies of their private schools. Of those which have shown an interest, some have prohibited racial discrimination while others have enforced it. The latter efforts fall into two categories: Some laws forbid the operation of integrated private schools; others withhold from integrated schools benefits, ranging from tax exemption to free lunches, which are provided to segregated private schools. Both devices are plainly unconstitutional, and since both are achieved by the clearest kind of state participation, they raise no doctrinal difficulties with respect to current interpretation of the state action limitation.[56] Nonetheless, they deserve our consideration here, for their analysis will help illuminate the state action question when it arises in closely related situations.

If we limit our inquiry to the personal interests involved in a state's prohibition of integrated private schools, the balance is lopsidedly in favor of those who would integrate. The interest of the would-be students is the same as the interest of students in educa-

55. See the discussion of local responsibility in pt. III *supra*, dealing with freedom from brutality.

56. For a survey of the problems in adapting state action doctrine to private education, see Miller, Racial Discrimination and Private Education (1957).

tion generally—to exercise a personal choice to participate in a particular kind of institution, both as an end in itself and as a means to professional advancement. Furthermore, by hypothesis we are here concerned with institutions which would choose not to discriminate if there were no state compulsion; thus we add to the students' interest in free choice the same interest on the part of the management of the restricted schools. The case is at least as easy as that in *Shelley v. Kraemer*,[57] for it involves willing "sellers" as well as "buyers" of integrated education, with the state interceding to frustrate them both.

Against these interests there is arrayed the state's legislative policy to preserve segregation, either for fear of the consequences which may accrue to white students who are "exposed" to Negroes or for fear of the advantages which Negroes may attain through attending mixed schools. It merits restatement, however, that this policy is not needed to safeguard the individual legislators as private citizens, and that it does not express any personal interest. The legislature is not forced into distasteful associations because private schools choose to admit students without regard to their race.

The legislature is, of course, representative; in this context, presumably it represents those who are hostile to school integration. But whose hostility is relevant? Not that of the managers or owners of the schools, for they are coerced, by definition. Is it then the hostility of students who wish to attend segregated private schools? If so, the answer is that they are free to do so, even though some schools choose not to discriminate. The hostility which remains is that of the "public"—that is, others who are neither potential students nor the operators of schools. Unquestionably, these outsiders should be free to withhold their support from integrated private schools, and to express their feeling that integration is wrong. But there are limits on the legitimacy of their efforts to structure society to their liking, and one of those limits is that they may not prevent others from seeking to do the same thing. The parallel to the voting cases is striking: while one may seek political support for a program, he may not advance his program by interfering with the right of others to use the same political process to oppose him. Those who would achieve a segregated structure for society have no *legitimate* interest in shutting off the rights of others to associate freely for the opposite purpose.

57. 334 U.S. 1 (1948). See also Truax v. Raich, 239 U.S. 33 (1915).

By hypothesis, the impact of state legislative action on racial equality in private education is more serious than the impact of leaving the decision to the operators of the schools, since the state's coercion is directed only at schools which otherwise would adopt a nondiscriminatory policy. Combined with the relative weights to be assigned to the competing personal interests, this increased impact makes the constitutional balance even more one-sided. But there remain the issues of federalism, *i.e.*, the institutional values of local responsibility and local prerogative.

The imposition of a national judicial standard of equal protection raises questions of federalism as surely as does the exercise of congressional power to advance racial equality. But the local responsibility issue is hardly an issue at all; when the state positively enforces racial discrimination, it cannot be said to fulfill its responsibility for administering the national policy of racial equality. Thus, if the value of decentralization is to carry any weight in this balance, it must not be the decentralization of administration of a national policy, but the decentralization of decisional power—a local prerogative to choose governmental objectives.

The Supreme Court has, in the public school segregation cases, done much of our work for us. Local prerogative to set policy must be related to a "proper governmental objective,"[58] and the asserted justifications for segregation in public schools—avoidance of racial tensions, reduced educational efficiency owing to inferior preparation of Negro pupils, and the like—have been overbalanced by the impact of segregation on Negro education. It should be obvious that in the private school context, where attendance at an integrated school is not compelled but chosen, and where improperly prepared pupils need not be accepted, the fears which assertedly justified public school segregation should be much reduced. On the other hand, as we shall see presently, the impact of private school segregation on Negroes seeking education is also minor when compared with the impact of public school segregation. The solution to the issue of local prerogative must then rest on the associational interests which arguably justify the exercise of local power. As we have seen, these interests are all on the side of the schools and students who choose to integrate. The interest in local prerogative fails, as did the interest in local responsibility, to turn the constitutional balance in favor of state laws promoting private school segregation.

58. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

A state's prohibition against integration of private schools is thus clearly invalid.[59] But what of a program merely to give free milk to private schools, provided that they are segregated? The impact on Negro interests is very much reduced, but the program is nonetheless unconstitutional. It is as true of a free milk program as it is of the operation of a public school that a distinction based on race must be justified by a showing of a proper governmental purpose related to race. There is no such legitimate purpose in a discriminatory free milk program. Paraphrasing the original school segregation decision, we may say that "such [aid] . . . where the state has undertaken to provide it is a right which must be made available to all [private schools] on equal terms."[60]

Whether the state's enforcement of private school segregation takes the form of direct prohibition or discriminatory aid, the invalidity of the enforcement rests on an analysis which is the same as the one we have used to identify the values represented by the state action limitation. The parallel dramatizes what we have set out to show—that the state action question can be answered best when it is asked as a part of a broader examination of the competing constitutional interests.

When we turn to the cases in which the orthodox analysis raises the state action issue—the cases in which there is no state enforcement of discrimination, but where private school operators decide to exclude Negroes—the interests are not aligned in the same manner. Here the interests of the owners or operators of the schools are opposed to those of the Negro applicants. Consider these two institutions:

Case 13: Pilsbury Academy is a little-known week-end military school for teenagers. The school stands on land owned by the state and leased at a nominal rental. Forty per cent of the building costs were contributed by the state, and all of the property is tax exempt. Transportation, meals, and uniforms for the students are provided by the state. The other sixty per cent of the building costs were paid for by four retired colonels who operate the academy and who limit admission to white Protestants only. Operating expenses are

59. The dictum of a Tennessee court is clearly in error. State *ex rel.* Sloan v. Highlander Folk School, 5 RACE REL. L. REP. 91, 92 (Tenn. Cir. Ct. March 7, 1960).

60. Brown v. Board of Educ., 347 U.S. 483, 493 (1954). See also Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 349 (1938). The real problem is not to find conduct which is impermissible, but to find a plaintiff who has standing to seek an injunction against discriminatory assistance to segregated private schools.

met from fees, alumni gifts, and institutional grants. Pilsbury Academy is but one of four similar nonprofit military schools serving the same metropolitan community and it is the only one which excludes Negroes.

Case 14: Zenith Medical College is a nonprofit institution financed wholly from private capital, tuition, alumni gifts, and institutional grants. Members of its Board of Governors are salaried and have not personally contributed any capital to the college. Zenith is the only medical school within a 500-mile radius. It enjoys a reputation for high professional competence. Its Board limits admission to white Protestants only.

Fourteenth amendment decisions suggest that the Pilsbury Academy is violating the equal protection clause, but that Zenith Medical College is not. Do these results accurately reflect a reasoned application of the purposes of the state action limitations?

A. *Interests of the Parties*

The interest of colored children in attending Pilsbury Academy is slight next to that of colored students in entering Zenith College. With respect to the former, since little professional advancement is likely to result from obtaining a certificate of attendance, the interest is largely one in freedom to associate to pursue an avocational interest in military discipline and to enjoy the unremarkable status that comes with being a Pilsbury alumnus. With respect to admission to Zenith, the interest involves fundamental desires for intellectual self-fulfillment and the acquisition of means to satisfy basic aspirations in professional accomplishment, earnings, housing, and social status.

The proprietary and nonassociational freedoms of the managers, donors, teachers, and students at the two institutions are nearly the same. It may even be that the interests of the teachers and students are not affected by the policy at either institution; they did not participate in the decision to exclude Negroes, and a different policy may not offend them. With respect to the donors, the interests are largely proprietary, *i.e.*, concerned with their freedom to dispose of their own earnings according to their own conscience, since they are not brought into personal contact with the students.

With respect to management, both the Pilsbury colonels and the Zenith Board of Governors have nonassociational interests at stake, but the colonels also have a proprietary interest since they person-

ally contributed a substantial part of the school property—a claim the Zenith Board cannot duplicate.

In both cases it is clear that there are some legitimate claims opposed to the minority interest in access. At this level of inquiry, it does not follow that the presence of some state assistance to the Pilsbury Academy should distinguish it within the state action analysis. Indeed, since the interest of the adversely affected Negro students in Zenith College is so much greater than the interest of Negro children in attending Pilsbury Academy, the need for equal protection safeguards more strongly favors applying the fourteenth amendment to Zenith than to Pilsbury; at least the absence of obvious state connections ought not automatically insulate the Zenith Board from constitutional demands for equal protection.

B. *Impact of the Decisions to Discriminate*

Looking again to the descriptions of Pilsbury and Zenith, it becomes quite clear that the impact of the discriminatory decisions on the minority interests is only casually related to formal state connections. We may agree that the action of the state was a *necessary condition* to the success and existence of the Pilsbury Academy, since it provided land, capital, and tax exemptions; but the same proposition can be applied to Zenith College, so that the impact of the decisions to discriminate turns on other considerations.

Zenith Medical College receives local police and fire protection. As an educational institution, it is exempt from taxation and its donors may take their contributions as income tax deductions. It is served by municipal sanitation, power and light agencies and, although it pays for these services, still the continued ability and willingness of the state to sell are necessary conditions of Zenith's operation. Similarly, state accreditation of the school is necessary for its graduates to qualify for state medical examinations and to participate as interns or residents in state clinics and hospitals. If all these connections were withdrawn unless Zenith revised its admissions policy, it is unlikely that Zenith could continue to exclude Negroes. Thus, discrimination could hardly take place without state assistance at either Pilsbury or Zenith. We do not suggest, however, that satisfaction of a "but for" test settles the question of state action, or even exhausts the impact inquiry, although in other contexts the courts have occasionally spoken as though it did.[61] If

61. See text accompanying notes 14–20 *supra*.

such a test were adopted, there would be scarcely an area of activity in which a privately made decision to discriminate could be sustained.[62]

More significant than the fact that discrimination could not be accomplished if the state withdrew its support are the consequences which flow from the discrimination; here the impact is clearly more serious with respect to Zenith than with respect to Pilsbury. Exclusion from Zenith College means—for all but the wealthiest or most talented Negro students—exclusion from the medical profession, there being no other medical school within 500 miles. Exclusion from the Pilsbury Academy can be little more than an annoyance by itself, since three similar schools operate on a nondiscriminatory basis within the same community and, as already suggested, access to Pilsbury is not related to any especially critical interest.

C. *Local Responsibility*

We have suggested that Pilsbury Academy violates the equal protection clause as presently interpreted. This estimate would be unquestionable if the reviewing court were to conclude that the state had set up the "private" arrangement as a means of avoiding its own obligation to provide facilities of this kind only on a nondiscriminatory basis. The attempted leasing of the buildings of Little Rock's Central High School to a private corporation which would operate a segregated school was a constitutional failure.[63] In another connection, the Supreme Court warned the same school board that "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command . . . ."[64]

Even if no such conclusion could be drawn with respect to the origins of the state's aid to Pilsbury Academy, present formulations of state action would surely include this case. The discussion to this point suggests also that considerations beyond a mechanical view

62. If fire and police protection and all municipal services were to be withdrawn from homeowners who declined to admit Negroes into their homes because of race, the privately made discriminatory decision would not long endure. Yet the fact that "but for" these state connections the homeowner would be unable to discriminate has never persuaded the courts that the fourteenth amendment applies, nor should it. See Hackley v. Art Builders, Inc., 179 F. Supp. 851 (D. Md. 1960).

63. Aaron v. Cooper, 261 F.2d 97 (8th Cir. 1958).

64. Cooper v. Aaron, 358 U.S. 1, 19 (1958). For evidence of increasing judicial impatience with resistance and evasion by the states, see the history of Bush v. Orleans Parish School Bd., in 6 RACE REL. L. REP. 74 (1961); 5 *id.* at 655–69, 1000–27 (1960).

of state action make it at least as imperative to extend the guarantees of equal protection against Zenith as against Pilsbury. It may be objected that such a limitation on Zenith may be self-defeating since it might result in the abandonment of the school by its supporters; that would surely be a more serious loss to the community than the loss of Pilsbury Academy for similar reasons. One hesitates to predict such a withdrawal of support, but even assuming that it were to take place, some good consequences would accompany the bad. The closing of Zenith would help to end the disparity between the races which the Zenith policy had encouraged. Furthermore, Zenith's closing would probably result in local pressure to establish a public medical school which would meet the community's needs, as well as the demands of the equal protection clause.

It is in this third dimension—that of local responsibility—that the atypical character of our hypothetical schools becomes clear. For although only a few states have prohibited discrimination in private schools, nearly all the states have established equivalent public institutions which must, under any current view of the fourteenth amendment, be open to all qualified students. In providing such schools, the states do fulfill part of their responsibility to afford educational opportunities to satisfy the interest of Negroes in education—perhaps more effectively than were they to abandon public education and enact a law prohibiting discrimination in private schools. Thus the net effect of private school discrimination is ordinarily not to cut off access to quality education, but is largely confined to a vestigial reinforcement of segregation, with some accompanying sense of inferiority and loss of status by the deprived minority. In acknowledging the offsetting interests of the proprietors and contributors in the operation of their schools, it may be concluded that the courts are not warranted in expanding the equal protection clause wholesale to cover all educational institutions, where the impact of discrimination has been lessened through the establishment of unsegregated public schools.

Nonetheless, whether or not the states are to be fastened with a "duty" to establish professional colleges or other schools—a proposition the Court has thus far avoided for good and obvious reasons—the failure of a state to establish adequate public institutions, free of racial restrictions, would provide additional justification for imposing equal protection limitations on colleges such as Zenith.

This is a conclusion which the Supreme Court might reach, but which it could reach only with the greatest difficulty, using the language which provides today's gloss of state action.

VI. EMPLOYMENT

Employment discrimination, like discrimination in voting, education, or housing, may affect vital personal interests in living standards, in intellectual satisfactions, and in a sense of professional accomplishment. Without access to the professions, the incentive to take advantage of newly won access to educational institutions is weakened.[65] Equally important in our status-conscious society may be the loss of the social acceptability and community influence which accompany a good job.

The characterization of a case as one concerning employment discrimination, however, is no guarantee that the particular interest at stake is a fundamental one, so that constitutional protections are more likely to apply. The contexts in which racial discrimination occurs will vary the extent of the impact on Negro interests, as well as the weight to be given the interests themselves. Similarly, competing interests will differ in their strength from case to case. These differences explain many of the results in state action cases, but they do not correspond with the formulas for state action which are now standard.

Consider the following cases, neither of which—under a doctrinaire view of state action—violates the guarantee of equal protection:

Case 15: An independent gas station owner fires his only Negro employee and establishes a firm policy of not hiring any Negroes. (This was our Case 3.[66])

Case 16: A large automobile manufacturer in Flint, Michigan, fires sixty-five Negroes on its professional staff and establishes a firm policy of not hiring Negroes for professional positions.

Case 15 involves, for the Negro employee, a loss which is largely economic; he has not lost any significant status, nor any special job satisfactions. The impact of the owner's action may be rather limited even as to this one man, depending upon the availability of other jobs at the same low skill level within the community.

65. See 1 CIVIL RIGHTS COMM'N REP. 275 (1959) (views of Dr. John H. Fischer, Superintendent of Schools of Baltimore, Md.).

66. P. 6 *supra.*

Case 15 is also obviously different from Case 16 in the degree of involvement of the employer's constitutionally legitimate interests. In addition to his proprietary interest—to dispose of property he has earned according to his own desires—there is a personal interest in his freedom to choose his associates (presumably the policymakers in Case 16 have slight occasion to mingle with their employees). Moreover, the employer's interest in Case 15 may involve his own economic freedom, should it appear that retention of the colored employee may result in a boycott of his station by white customers. And finally, the availability of alternative local remedies is relevant; the application of federal constitutional guarantees may be inappropriate just because it will discourage a sense of community responsibility. Without unraveling the case completely, it is fairly clear that there is little justification for applying the fourteenth amendment to the facts of Case 15 in this limited context.

What if the gas station owner had previously paid the employee a month's advance wages, and the discharged employee were to refuse to return the money, forcing the employer to sue to get his money back? Does *Shelley v. Kraemer*[67] mean that the state court cannot lend its power to help the employer because there would have been no dispute had the employee not been fired for racial reasons? Such a mechanical test for state action, although supported by Mr. Justice Douglas in *Black v. Cutter Labs.*,[68] seems wholly unjustified; it discards the purposes of the state action limitation in favor of a formula which makes the availability of constitutional guarantees turn on accidents of procedure. A proper application of the state action limitation to cases of this kind must instead rest on the considerations of impact and justification discussed above. Since the constitutional balance favored the employer's exercise of choice to discharge the Negro (and assuming that an employee would have no right to retain advance payment after discharge in the absence of a special contract provision), there should be no constitutional obstacle to the employer's court action.

But suppose that every independently owned gas station in a large city should discharge its Negro employees. The impact on Negro employment in the community would not differ substantially from the impact of the decision made by the large manu-

67. 334 U.S. 1 (1948). For a discussion of the *Shelley* case, see text accompanying notes 84–104 *infra*.

68. 351 U.S. 292, 302–03 (1956) (dissenting opinion).

facturer in Case 16, but the state action limitation need not be applied in just the same manner. Each small proprietor has his own interest in choosing his associates; the multiplication of effect on Negro employment is arguably matched by the multiplication of personal freedom justification on the side of the proprietors. The assumption, of course, is that the proprietors are so motivated. If some form of "conscious parallelism" were shown, so that the owners might be found to be responding less to their own associational choices than to fear of a boycott by white customers, then the argument based on associational freedoms is lost.[69] The economic justification argument of a large number of small employers acting in concert does not differ significantly from that of a large employer.

What would be different if the discharges resulted not from the owners' decision, but from a state law which forbade the employment of Negroes in gas stations? The impact on Negro employment is not substantially greater than it would be if each owner were to decide against hiring Negroes. But since the decision to discriminate comes from the legislature rather than from each gas station owner, both the employees' and the employers' interests—

69. The distinction between economic and associational interests has evidently been persuasive to the federal courts in the labor union cases. While a Negro cannot compel a union to admit him to membership, Oliphant v. Brotherhood of Locomotive Firemen, 156 F. Supp. 89 (N.D. Ohio), *cert. denied*, 355 U.S. 893 (1957), *aff'd*, 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959), he can compel the union to refrain from discriminating against him in its collective bargaining, Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). But the associational interest in union membership in the 1960's is of dubious weight, in view of the typical union's shift away from social activities and toward purely economic functions. When the union controls access to employment for workers with various skills, it begins to resemble the combination of all the employers in a community. Nonetheless, the conclusion that constitutional guarantees should be applied across the board to unions is unwarranted, at least where statutory protections are available, as Professor Wellington has ably demonstrated. Wellington, *The Constitution, the Labor Union, and "Governmental Action"*, 70 YALE L.J. 345 (1961). The principal danger to be avoided is the overloading of the judiciary with a cumbersome body of technical rules of labor law which become embedded in the Constitution. The legislative process may be more appropriate for fashioning and refashioning most rules of this kind. *Ibid.* The same sort of institutional argument may be directed at suggestions for constitutional protection against corporate power. See, *e.g.*, Freund, *The "Charles Evans Hughes" Lecture*, 19 N.Y. COUNTY LAW. ASS'N B. BULL. 12, 14 (1961). But surely the courts need not create an entire "corpus of constitutional law to deal with the most subtle and complex and varied issues of labor law and corporate law," *ibid.*, just because they extend *some* constitutional protection against *some* quasi-private action. If a court were to grant relief against discharges of the kind noted in our Case 16, for example, the demands on their lawmaking capacity would be modest, and the form of relief traditional.

We are here concerned primarily with constitutional guarantees of racial equality. If we may assume congressional hostility to civil rights legislation, it is unlikely that statutory protections for such interests will be forthcoming, desirable as they may be. It is not a novel proposition to suggest that the Supreme Court may be willing to advance various civil rights interests *because* the other branches of the federal government have failed to do so.

proprietary, associational, and economic—are denied. Since employers cannot hire whom they please, and Negro employees have lost their opportunity to work, *both* are in the adversely affected class.[70]

The use of the legislative power to restrict these interests in behalf of remote third parties who may be fearful of their free exercise is an intolerable limitation on personal freedoms; the legislative choice embraces values which are not constitutionally legitimate, and it operates with an impact that is clearly excessive. The same would be true even though the law were to require only the segregation of Negro gas station employees rather than their total exclusion. Although the impact on racial equality is lessened, there is still no redeeming value in the desire of third persons who, from racial antagonism, wish to affect the employment relationship without regard to the wishes of the employer or his employees.

If the case did not involve a state law, but did involve public assistance to the employer who discharged his employee for racial reasons, how would the situation be altered? Here the employer's "freedoms" must again be treated as adverse to those of the Negro employee, since the discriminatory decision is made by him. But the legitimacy of the employer's claims is much reduced: to the extent that the station has been supplied by others, as where the operator has leased the station from the state, or the state has insured a bank loan enabling him to operate, there is less legitimacy in his claim that he should be able to dispose of what is "his own" according to his own desires. The proprietary interest and some of the economic interests are partly those of the state, the bank, and the state insuring agency. The employer's interests are thus limited to associational and lesser economic claims. To the extent the state is involved it has no personal interest of nonassociation which justifies its discouraging Negro employment or permitting its assets to be used for such a purpose.

May the state assert a legitimate economic interest by claiming that a boycott of the gas station may jeopardize the economic stake it holds in the gas station for the taxpayers of the state? Not seriously, for any increased costs to the state are spread over the whole community; only a slight invasion of the economic interest of any

70. In *Shelley v. Kraemer*, the Court's opinion emphasized the fact that both the buyer and the seller of the land in question were willing to proceed with the sale. 334 U.S. 1, 19 (1948). See also Truax v. Raich, 239 U.S. 33 (1915).

individual citizen can result from the application of constitutional guarantees of racial equality in the state's employment practices. Case 15 is thus a closer one; if the fourteenth amendment does not apply to protect the Negro, the reason is that there is still something to be said for the employer's claims, and that the impact of the discriminatory decision on the claims of the affected employee is not overwhelming.

If the employer is an absentee owner of the station and does not work with his employees, there is much less legitimacy to a claimed interest in nonassociation. Since aid from the state also reduces his proprietary and economic interests, the constitutional balance may shift in favor of protecting the Negro from the impact of the discriminatory decision, unless there are local remedies available which ought not be discouraged by federal intervention.

In Case 16, we have already noted that the policymakers of the large corporation which refused to tolerate Negroes in professional jobs cannot defend the decision by their own interest in nonassociation, since they scarcely have occasion to mingle with their employees. Furthermore, the company's economic interests—to prevent loss of business from a boycott, or a loss of labor supply from white employees who will not work with Negroes—while legitimate, are not likely to be seriously affected. Imposing an equal protection standard on the company should have little impact on its sales or labor supply, for two reasons. The first goes to the company's dominant position in the community. Second, the same constitutional standard will no doubt be applied to the company's oligopolistic competitors. Moreover, the company policymakers themselves have at best a diluted proprietary interest in selecting employees on bases unrelated to job qualification, since the property they manage is probably not substantially their "own."

On the other side, the impact of the discriminatory decision on the legitimate interests of the adversely affected class in subsistence, a sense of professional accomplishment, and status may be very great, especially if comparable opportunities are not available within the community. Since the 1946 decision of *Marsh v. Alabama*,[71] the Supreme Court has expertly avoided any elaboration of its equation of a company town's restrictions on vital personal interests to restrictions imposed by a state.[72] As Professor Manning

71. 326 U.S. 501 (1946).
72. *E.g.*, Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949),

has shown, the issue in a given case must be narrowed by reference to the power specifically exercised and the particular interests invaded by its exercise.[73] Further, the issue must be narrowed again by a particularized consideration of the justification, if any, for the exercise of power.[74] For a generation which has been educated in a climate more favorable to claims of job security than to claims of liberty of contract, however, it does no violence to an enlightened state action concept to apply the equal protection clause to Case 16: the minority interests are important ones, the discriminatory decision involves an exercise of power affecting these interests nearly as seriously as a legislative decision, the legitimate management interests in its prerogative to make such a decision seem slight, and the effect on those interests which result from forbidding such a use of power is modest.

We have not yet dealt with the interests in promoting local responsibility in the employment context, but it should be acknowledged that there has already been a significant development of local responsibility in this field.[75] The adoption of state fair employment practice laws and their effective enforcement may justify the withholding of federal-law sanctions, statutory or constitutional, in

---

cert. denied, 339 U.S. 981 (1950); Watchtower Bible & Tract Soc'y v. Metropolitan Life Ins. Co., 297 N.Y. 339, 79 N.E.2d 433, *cert. denied*, 335 U.S. 886 (1948).

73. Manning, *Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations*, 55 Nw. U.L. Rev. 38, 44–46 (1960).

74. Suppose, for example, that the freedom to distribute literature is denied, not by the managers of a company town, but by the private owners of a large apartment project. In just such a case the New York Court of Appeals held that a refusal by the owners to permit the plaintiffs to hand out their literature in the corridors of the apartment houses was not the equivalent of action by the state. Watchtower Bible & Tract Soc'y v. Metropolitan Life Ins. Co., 297 N.Y. 339, 79 N.E.2d 433, *cert. denied*, 335 U.S. 886 (1948). The court's distinction of *Marsh v. Alabama* seemed frivolous on the face of things: the case at hand involved distribution in the building corridors, while *Marsh* involved distribution on the company town sidewalks. That does not, somehow, seem to dispose of the issue of state action—at least not as that limitation is usually conceived. But if we examine the impact of the restriction, and its justification, we may not unreasonably conclude that the court came to the right conclusion.

In the *Watchtower* case the New York court permitted the apartment owners to give protection to their tenants' interests in privacy, just as we suggest that an employer might properly consider his employees' associational preferences. That the interest in privacy is not without weight was made official just a few years later, when the Supreme Court sustained a "Green River" ordinance which forbade door-to-door solicitation by salesmen who lacked invitations from the householders on whom they called. Breard v. Alexandria, 341 U.S. 622 (1951). The New York court used the language of state action to achieve a sound balance of competing claims of a constitutional dimension. The size of the housing project, while relevant, was not controlling.

75. Some twenty states and a number of cities have established commissions to deal with racial discrimination in employment, and some of these are also given powers over other forms of racial discrimination. See generally Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 Harv. L. Rev. 526 (1961).

those states which have them. The value of settling such problems at the community level is hard to overstate, mainly because such solutions tend to extend their beneficial effects beyond the individual cases which may come before a court or administrative body for decision. The experience with school desegregation[76] and voting,[77] in contrast, indicates that racial equality forced from outside (and the federal court may seem to be outside even though it sits across the street from the state court) tends to be limited in its effect to the case at hand. A useful comparison in the South may be found in the voluntary, locally arranged desegregation of dime store lunch counters.

The principle of local responsibility has weighed most heavily in the few cases which have equated state inaction with state action.[78] These decisions suggest that the fourteenth amendment imposes an affirmative duty on the states to guarantee equal protection, and that a state's failure to discharge its duty enables Congress to legislate pursuant to section 5 of the amendment to provide remedies against the private offenders. Professor Hale, the first to examine this formula at length, would have limited it to situations in which the state has withdrawn previously existing local remedies, as in the repeal of an antilynch law or the repeal of a common-law innkeeper's duty.[79] Since less than half the states have adopted fair employment practice legislation, this view of local responsibility would be of limited help in the employment field. Moreover, a constitutional guarantee which depends on the historical accident of previously existing local remedies does not truly reflect a local responsibility principle.

---

76. The first five years after the *Brown* decision saw virtually no progress in school desegregation in the Deep South. In May 1959, not a single school district had been desegregated in Alabama, Florida, Georgia, Louisiana, Mississippi, or South Carolina. Token integration (in a handful of school districts) had taken place in Arkansas, North Carolina, Tennessee, and Virginia, and has since taken place in Florida, Georgia, and Louisiana. Throughout the South, only twenty-six school districts had been desegregated by court order. See 1 CIVIL RIGHTS COMM'N REP. 296 (1959); 2 *id.* at 39 (1961).

77. Thus, despite such decisions as Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), *aff'd mem.*, 336 U.S. 933 (1949) (Alabama constitutional requirement that prospective voter be able to "understand and explain" any clause of the United States Constitution to the satisfaction of local registrars held invalid), the "literacy" test remains the most widely used device for denying Negroes the right to register to vote on the basis of their race. Four persons were registered at the conclusion of the two-year litigation in United States v. Raines, 172 F. Supp. 552 (M.D. Ga. 1959), *rev'd*, 362 U.S. 17 (1960); United States v. Raines, 189 F. Supp. 121, 134–35 (M.D. Ga. 1960). See generally Comment, *Judicial Protection of Minority Voting Rights: The Case for Constitutional Reform*, 22 OHIO ST. L.J. 390, 398, 412–18 (1961).

78. See cases cited note 30 *supra*; *cf.* Terry v. Adams, 345 U.S. 461 (1953).

79. See note 124 *infra*.

Others, particularly Frank and Munro, have been bolder in suggesting that with respect to certain interests such as the right to own or use land or the right of access to places of public accommodation, state inaction in the face of privately made discriminatory decisions will support federal remedies whether or not the state had abandoned previously available remedies.[80]

At least one case goes further than either of these, suggesting that the states have an affirmative duty to enforce equal protection generally, and that acts of private citizens which interfere with this duty are enjoinable in the federal courts.[81] The significance of this suggestion has not gone unremarked:

> If the rationale of [the *Hoxie* case] . . . extends to private action which is not directed specifically at state officials and which interferes only with a state's performance of its general duty to ensure to its citizens the guarantees of the fourteenth amendment, it would seem to undermine the principle that the prohibitions of the fourteenth amendment do not apply to private action.[82]

Our position here, however, is simply to acknowledge that the failure of the community to protect its citizens from severe abridgments of fundamental interests is one more consideration the federal courts are entitled to review in determining whether they can provide relief from these private abridgments. The consideration is relevant whether the relief sought is provided by federal laws which proceed from the fourteenth amendment, or whether it is based on the implications of the unexecuted amendment itself. As but one consideration, it should neither be converted to doctrine nor made absolute. Such an absolute would make no more sense than an extension of *Marsh v. Alabama* to the proposition that private ownership of property is literally irrelevant in determining whether the fourteenth amendment has been offended, or a reading of *Shelley v. Kraemer* for the proposition that wherever a state court or policeman helps to make effective a private decision to discriminate, equal protection has been denied.

Thus the failure of a state to legislate against the small gas sta-

---

80. Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131 (1950). Thus, according to their interpretation of the equal protection clause, "It was generally understood that Congress could legislate to secure these ends, without regard to whether the particular objective was frustrated by state action or state inaction." *Id.* at 168. An interest in employment, however, is not in their list of interests to which this theory applies.

81. Brewer v. Hoxie School Dist., 238 F.2d 91 (8th Cir. 1956).

82. 70 HARV. L. REV. 1299, 1300 (1957); see note 30 *supra.*

tion owner in Case 15 should not, *by itself*, support the application of a federal injunction. By the same token, however, failure of the state in Case 16 to protect persons from the serious abuse of power reflected in the corporation's discriminatory policy might make the difference in view of the other elements in the case. A selective application of the state action limitation can thus be used as a stimulus to local responsibility rather than as a screen to hide local failures of responsibility.

VII. Housing[83]

The decision in *Shelley v. Kraemer*[84] seems irresistibly correct. But since the opinion raises more questions than it answers, attempts to rationalize the *Shelley* case within traditional state action formulas tend to fail. When Mr. Chief Justice Vinson said that "[racially] restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed . . . by the Fourteenth Amendment,"[85] he provoked some highly quotable avowals of discontent:

> What is the principle involved? . . . May not the state employ its law to vindicate the privacy of property against a trespasser, regardless of the grounds of his exclusion, or does it embrace the owner's reasons for excluding if it buttresses his power by the law? Would a declaratory judgment that a fee is determinable if a racially restrictive limitation should be violated represent discrimination by the state upon the racial ground? Would a judgment of ejectment?[86]

The editorial response to these two expressions has centered around an attempt to discover or invent the *kind* of state connection which will satisfy the state action requirement. It is suggested, for example, that the state acts in the sense of the amendment when it coerces private discrimination, but not when it simply lends its aid to such racial discrimination as private individuals may choose to practice, as by furnishing a policeman to escort an unwanted guest

83. Hotels, motels, and other forms of transient housing are more appropriately considered in the section on public accommodations, pt. VIII *infra*.

84. 334 U.S. 1 (1948) (holding unconstitutional the enforcement by two state courts of restrictive covenants limiting the occupancy of real estate to Caucasians).

85. *Id.* at 13. That Mr. Chief Justice Vinson meant what he said is attested to by his dissent from the Court's disposition of Barrows v. Jackson, 346 U.S. 249 (1953), in which the *Shelley* rule was broadened to cover a judicial award of damages against a seller for breach of a racially restrictive covenant.

86. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 29–30 (1959).

from a private home.[87] This analysis is undeniably supported by the just-quoted language of the *Shelley* opinion, and it does give some recognition to the personal interests involved,[88] but it perpetuates the untenable distinction between the state action requirment on the one hand and the balance of "substantive" constitutional interests on the other. This way of looking at the problem, it seems to us, is even more dangerous than the suggestion's other unfortunate aspect: its assumption that every private discrimination is invalid once the right formal state connection has been found.

To avoid these pitfalls, an alternative suggestion has been made that *Shelley* may be read as an example of state assistance to a private exercise of "powers that are peculiarly akin to sovereign powers,"[89] by way of analogy to *Marsh v. Alabama*[90] and *Terry v. Adams*.[91] The idea is that the state's ordering of private affairs runs all the way from its "neutral" enforcement of private decisions to discriminate—as where a homeowner refuses to allow Negroes to visit him—to its establishment, by common-law rule, legislation, or executive directive, of rules which do not depend on any exercise of private choice for their application—as, presumably, where Negroes are forbidden by law to live in certain areas.[92] The latter type of ordering, it is said, satisfies the state action requirement.

Such a suggestion has merit in that it abandons, at least for purposes of analyzing judicial action, the separation between the state action inquiry and the inquiry into the substantive claim of denial of a constitutional right. But it unhappily attaches importance to the notion that the individual homeowner who ejects a Negro, without the aid of a court or a policeman, is not exercising "sovereign" power, but some other kind of power. Of course the owner has the power (in a legal sense) to eject an unwanted person, only because he is the "owner"—because the law recognizes certain pow-

87. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 13–16 (1959). Professor Pollak is careful to limit the scope of his "test": "What is offered is tentative, a beginning point, premised on the avowed value judgment that in 1959 it is consistent with the democratic theory embodied in the fourteenth amendment to [permit such privately chosen, uncoerced racial discrimination] . . . ." *Id.* at 17.

88. As did the Court's reference in the *Shelley* opinion to the state's coercion of willing buyers and sellers. 334 U.S. at 19.

89. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1116 (1960).

90. 326 U.S. 501 (1946).

91. 345 U.S. 461 (1953).

92. Racial zoning was held violative of the due process clause of the fourteenth amendment in Buchanan v. Warley, 245 U.S. 60 (1917).

ers in him. If the law did not have application to this circumstance, then the owner might eject the Negro only if he were big enough. The potential application of law is what distinguishes these relationships from those of a jungle. The state is *not* neutral in preferring control over private property ahead of full racial equality in this circumstance; rather, it has "structured"[93] its legal system by making a choice of values.

That, it seems to us, is the key to *Shelley v. Kraemer*. The substitution of a test of "powers . . . akin to sovereign powers" for a test of state action is not really an analytical advance. Rather, the interests we have described in the foregoing sections of this article must be weighed. Such an approach obviously requires the abandonment of the Court's statement in *Shelley* that the restrictive covenants were valid "standing alone." Private arrangements should be held valid or invalid depending on their functional similarity to public arrangements, not their formal connection to a branch of the government. We do not suggest that the state action limitation is outmoded, but only that it should be used consciously as an instrument of constitutional policy and not as a formula for escaping the duty to make policy.

The interest of the segregated minority in racial equality in housing is as basic as the need for shelter itself, for the system of restrictive covenants results not merely in segregation but in the denial of adequate housing to Negroes.[94] Even if segregation into racially pure neighborhoods were the only result, the Supreme Court has long since rejected the "separate but equal" formula as applied to housing.[95] But the covenant system in operation does not permit equal housing for Negroes; it fences them into a "Negro ghetto" which typically falls well below the quality of white neighborhoods occupied by persons of comparable means.[96]

At the time when the restrictive covenant cases arose, the nation faced a serious shortage of housing generally; the availability of GI loans and the forced accumulation of earnings during the war combined with the wish of many former servicemen to settle down, so that there was an unprecedented demand for housing. For the first time, Negroes shared significantly in the demand, and for

93. The reference is to Mr. Justice Clark's opinion in Terry v. Adams, 345 U.S. 461, 484 (1953).
94. See 1 CIVIL RIGHTS COMM'N REP. 343–54 (1959).
95. Buchanan v. Warley, 245 U.S. 60 (1917).
96. See generally WEAVER, THE NEGRO GHETTO (1948).

them the housing shortage was doubly acute.[97] The result was that formerly all-white neighborhoods became dotted with Negro families; frequently, real estate operators would panic the remaining white residents into selling at sacrifice prices; the property could then be sold to Negroes at a fancy profit;[98] the system of "blockbusting" was the result.[99] The response was the widespread formation of "improvement" or "protective" associations, designed to keep Negroes out of white neighborhoods; the NAACP's brief in one of the restrictive covenant cases noted that there were some 150 of these associations in the Detroit area alone. The favorite technique of such an association was the circulation of a restrictive covenant for signature by the residents of a neighborhood. As the use of the covenants became more popular, the range of choice for Negro home buyers, or even renters, narrowed.

When Negroes with the means to buy homes in good neighborhoods are denied access there, they naturally turn to the best homes in poorer neighborhoods. They are able to outbid others, and those others turn to relatively poorer housing, and so on. The result is that virtually all Negro housing sells at a higher price than comparable housing for whites, because of the classical operation of supply and demand. Restrictive covenants deny to nearly all Negro families the kind of housing which they might otherwise afford.[100] Segregation is thus not the covenants' only consequence, although in the North housing segregation is the foundation for most other forms of segregation.

Finally, the restriction of a large portion of the population to a relatively small land area necessarily results in crowding. "Doubling up" is a euphemism for the piling of two or more families into housing designed for one. Standards of sanitation have to be sacrificed; if building codes are enforced strictly, a great many people will simply be without homes. Disease rates are notoriously higher

97. See VOSE, CAUCASIANS ONLY 56–57 (1959).

98. See, *e.g.*, *id.* at 110–11. A particularly chilling description of the scare tactics of some real estate dealers may be found in *Hearings Before the United States Commission on Civil Rights, Housing*, vol. 1, at 218–29 (1959).

99. "Blockbusting" is still typical of the expansion of Negro neighborhoods. See 1 CIVIL RIGHTS COMM'N REP. 367, 379–80, 430–33 (1959).

100. The pattern is described by Judge Edgerton in his dissent from the decision in Hurd v. Hodge, 162 F.2d 233, 243–45 (D.C. Cir. 1947). This dissent also rested on the legal arguments which were persuasive to the Supreme Court when it reversed the District of Columbia Circuit in the companion case to *Shelley v. Kraemer*. Hurd v. Hodge, 334 U.S. 24 (1948). Judge Edgerton's opinion expands his earlier views in Mays v. Burgess, 147 F.2d 869, 873 (D.C. Cir.) (dissenting opinion), *cert. denied*, 325 U.S. 868 (1945); Mays v. Burgess, 152 F.2d 123, 125 (dissenting opinion), *enforcing* 147 F.2d 869 (D.C. Cir. 1945).

under such circumstances than for the rest of the population. Crime and delinquency similarly rise.[101]

Combined with this staggering impact on Negro interests of a personal kind is the interest, shared by seller and buyer, in the free alienation of land. When the Court in the *Shelley* opinion referred to the willingness of sellers and buyers to make their deal, it gave new expression to a common-law tradition at least as old as *Quia Emptores*. This principle seems especially applicable to a system which may exclude from eligibility to buy as many as one-third of the residents of a city. One could hardly find a better occasion for upholding the freedom of contract.

Against these interests there stood two countervailing considerations on the side of the white neighbors: (a) The threat of falling property values; (b) the chance that the neighborhood would soon become virtually all Negro, coupled with their interest in nonassociation. The first threat is only that. Whatever else may be said of "blockbusting," ordinarily it does not lower property values; the pressure for Negro housing has thus far been enough to keep demand and prices up.[102] The second concern may or may not be warranted, depending on a great many variable factors.[103] But, assuming as a fact a potential rapid turnover of a neighborhood from all white to all Negro, whether this fact *justifies* exclusion of Negroes on associational grounds is another matter. The association of neighbor with neighbor is not a fixed relationship; it varies according to the neighbors' choices. In modern urban America, if one does not care to associate with his next-door neighbor, he need not associate; an interest in being free from the mere sight of one's neighbor does not rise to the level of constitutional dignity. Of course the interest in nonassociation is legitimate; of course it is

101. Crowded housing is plainly not the sole cause of slums. See, *e.g.*, THE EXPLODING METROPOLIS 115–18 (Fortune Magazine ed. 1958). But Negroes who want to escape from such conditions know that crowding is *a* cause of slum conditions, and an important one. A 1945 leaflet of the Chicago branch of the NAACP, seeking support for a campaign against restrictive covenants, concluded: "Let's buy freedom from SLUMS!" VOSE, CAUCASIANS ONLY 72 (1959). See also Judge Edgerton's opinions cited in note 100 *supra*.

102. See LAURENTI, PROPERTY VALUES AND RACE 50–53 (1960). The immediate post-*Shelley* situation is described in VOSE, CAUCASIANS ONLY 218–23 (1959).

103. A recent study in Philadelphia shows that while the rate of turnover may be as rapid as three years, the rate is highly variable, depending on such factors as the following: The availability of reasonable financing terms for Negro borrowing; the general supply of housing, particularly for whites to occupy when they move; the activity of real estate operators; the proportion of rented homes (owned by absentees from the neighborhood) to "owned" homes; the proportion of land in commercial use; and even the proximity of parochial schools. RAPKIN & GRIGSBY, THE DEMAND FOR HOUSING IN RACIALLY MIXED AREAS 116–18 (1960).

relevant, and it cannot be ignored. But neither is it an absolute. In *Shelley v. Kraemer* the interest in nonassociation was not ignored, but outweighed.

There remains to be considered the national interest in promoting local responsibility and local prerogative. Historically, the restrictive covenant served as a substitute for the racial zoning laws which became vulnerable to constitutional attack in 1917.[104] Far from carrying out their responsibility for effectuating the national policy of racial equality, localities which made use of racial covenants operated at cross purposes.[105] The claim of local decision-making prerogative similarly lacks legitimacy when it is asserted in behalf of a scheme which shuts off the restricted minority from effective participation in the decision. The argument that "Negroes want to live among their own kind" hardly serves as a basis for confining them to that "choice."

We have said that the *Shelley* decision seems inescapable. But when the state action issue is raised in the case of a single homeowner who wishes to exclude Negroes from his property, the balance of constitutionally protected interests may properly be found to have shifted to the side of privacy, and the private control of property. Thus, if a tenant of a state apartment project invites all the white tenants of the building to an open house, the Constitution should not require him to invite the Negro tenants as well, even though the building is owned and operated by the state. The state's ownership indeed reduces the proprietary interest of the white tenant, but his personal interest in choosing his companions carries heavy weight. And it is vital to recognize that the interest denied the Negroes here is not housing, but entertainment, or association for its own sake.[106] The fact that hypothetical cases like this one are typically used to demonstrate the analytical poverty of the *Shelley* opinion shows that critics of that opinion are themselves often

104. Buchanan v. Warley, 245 U.S. 60 (1917).

105. In contrast, recent legislation in a few northern states and cities has been enacted to compel a nondiscriminatory policy by owners of various forms of private housing—principally multiple dwellings. See, *e.g.*, CONN. GEN. STAT. ANN. § 53-35 (1960); MICH. COMP. LAWS § 750.146 (1948); N.Y. CIV. RIGHTS LAW § 18; N.Y. EXECUTIVE LAW § 292. The latest New York estimate is that some 44% of the total of housing units in the state are covered by this legislation; for New York City, the figure is 70%. See N.Y. Times, May 18, 1961, p. 26, col. 5. See also CAL. CIV. CODE § 53.

106. In this respect the case resembles our Case 4, p. 6 *supra*. If the state were to forbid owners to invite Negroes to play on their property, then the interest of a punished owner would line up with that of the Negroes, and the impact of the discriminatory policy would be multiplied to cover all property, and not just that of a single owner.

mentally imprisoned by its words. If anything is clear it is that *Shelley*'s formalism need not be extended to nonhousing cases—or even to all housing cases.

A few more model cases may help make the point:

Case 17: A white tenant of an unfurnished state-owned apartment project decides to sublet his apartment (including his own furniture) for a month during the summer but announces that no Negroes need apply. Across the street, similarly appointed, nonsegregated apartments are available for short-term rental at no greater cost.

One may guess that the judicial balance will be struck in favor of the white tenant. He has little proprietary interest in the apartment building, but he has a considerable proprietary—and even personal—interest in determining who shall occupy his mattress and his linen. Furthermore, the impact on Negro housing is minimal, because of the short-term nature of the housing in question, because of the easy availability of other comparable housing, and because the discrimination is here limited to one apartment.[107] If the state were to forbid subletting to Negroes, then there would be three distinctions which would permit us to find a constitutional violation: (a) Not just one, but a great many apartments would be denied to potential Negro renters; (b) the state has no personal interests comparable to those of the white tenant; and (c) the interests of the tenant who is not permitted to sublet to a Negro are lined up with the Negro's.

Case 18: In a city of 20,000, one-third Negro, and at a time of severe housing shortage, an insurance company erects a 500-unit apartment development. It refuses to rent to Negroes.

Here there is no formal connection with the state to satisfy the traditional requirements of state action, and yet the constitutional balance seems to us to demand application of fourteenth amendment guarantees on the Negroes' behalf. When governmental aid is added, by way of obtaining the land through the exercise of eminent domain powers, or tax exemption,[108] or loans of money,[109] the

107. Professor Lewis would probably reach the same result, on the ground that the state in our hypothetical case did not intend to provide apartment facilities for use by the public, as distinguished from the individual tenant. See Lewis, *supra* note 89, at 1099–1102.

108. Both were involved in Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 529, 87 N.E.2d 541, 547 (1949), *cert. denied*, 339 U.S. 981 (1950) (4-to-3 decision holding that a Metropolitan Life Ins. Co. project need not admit Negroes to tenancy under such circumstances). It is usually supposed that the reason for denial of certiorari was Metropolitan's abandonment of the policy against admission of Negroes.

109. See, *e.g.*, Ming v. Horgan, 3 RACE REL. L. REP. 693 (Cal. Super. Ct. June 23,

only change in the alignment of constitutional interests is the reduction in the proprietary interest of the corporate owner.[110] That change makes but modest difference to our analysis, but it may make the crucial difference to the usual state action formulation. The legitimate interests on the owner's side are, first, its concern lest the admission of Negroes lower the demand for apartments—a concern not justified historically, and certainly not justified at a time of serious shortage of housing—and second, the interest of its white tenants who may not want Negro neighbors.

This "third-party" interest in nonassociation may be relevant not only in the context of housing, but also in education, employment, and public accommodations. A consideration of the wishes of persons who may not be in court does not require us to call the owner of the housing project (the school, the factory, etc.) the representative of whites who do not want association with Negroes; their interest is merely another circumstance proper for a court's attention when the balance is struck. Of course our hypothetical case concerns a new apartment project, in which there are no present occupants who have expressed a preference for white neighbors.

Suppose that the owner of the apartment project were to adopt a policy which did not exclude Negroes, but rather admitted them in a quota based on the ratio of Negroes to the whole community population. It might be argued that such a policy in fact increases the supply of better housing for Negroes, since developers who are assured that their apartments will not be entirely filled by Negroes may be more inclined to build new housing. But even the "benign quota" undeniably makes distinctions based on race, and if an adequate connection to a branch of government can be found, there

1958); *cf.* Levitt & Sons v. Division Against Discrimination, 56 N.J. Super. 542, 153 A.2d 700 (App. Div. 1959), *aff'd*, 31 N.J. 514, 158 A.2d 177, *appeal dismissed*, 363 U.S. 418 (1960) (application of state antidiscrimination laws to private housing assisted in financing by the United States); New York State Comm'n Against Discrimination v. Pelham Hall Apts., Inc., 10 Misc. 2d 334, 170 N.Y.S.2d 750 (Sup. Ct. 1958).

The Civil Rights Commission has urged radically increased activity by federal finance agencies to require lenders backed by federal guarantees to follow nondiscriminatory policies. The Commission argues forcefully that much can be done within the framework of existing executive authority to assure equal housing opportunities. Executive action along the lines of the Commission's recommendations could do much to relieve the pressure on the judiciary for resolving difficult issues of state action in the housing context. See 4 CIVIL RIGHTS COMM'N REP., HOUSING 150–53 (1961).

110. For an analysis of other forms of governmental assistance to private housing see Van Alstyne, *Discrimination in State University Housing Programs—Policy and Constitutional Considerations*, 13 STAN. L. REV. 60 (1960). See also 34 OPS. CAL. ATT'Y GEN. 1 (1959) (local urban redevelopment agencies may not service listings of private landlords who discriminate on racial grounds).

is no doubt that such a quota is unconstitutional when measured against current doctrine.[111] The analysis we suggest, however, may give some comfort to those who support the use of a benign quota as an avenue to more and better Negro housing, assuming that the housing is nonsegregated.[112]

Case 19: All real estate brokers in a suburban residential community consistently refuse to show houses to would-be Negro buyers.[113]

The impact of such a practice is similar to that of a pattern of restrictive covenants. Both prospective sellers and buyers are severely hindered in dealing, since the brokers form the main system of communication in the real estate market. And denial of access to higher class housing pushes some Negroes into poorer neighborhoods, where they can pay more than other Negroes, who are in turn pushed into still poorer neighborhoods, and so on.

In justification, the brokers may argue: "We are afraid that property values may fall if Negroes move in, and that our future commissions will fall as a result; if we show to Negroes, other people in the community won't come to us when they need the assistance of brokers. Besides, we represent the people in the community who don't want to live near Negroes." These are largely the same arguments made in favor of the restrictive covenants. Since the impact of the discriminatory practice is also so similar, we should expect the same judicial result—application of the guarantees of equal protection—if it were not for the dominant formal view of the state action limitation.

VIII. Public Accommodations

The recent rise of private organizations seeking to end segregation by extralegal, nonviolent means has directed national attention to racial discrimination in places of public accommodation. The attention is probably disproportionate, however, since Negro interest in access to such accommodations is certainly subordinate

111. *Cf.* Banks v. Housing Authority, 120 Cal. App. 2d 1, 260 P.2d 668 (1953), holding invalid the authority's policy of maintaining the "neighborhood pattern" in its rental policies, *i.e.*, renting only to Negroes in a Negro neighborhood, etc.

112. See Comment, 59 Mich. L. Rev. 1054 (1961).

113. This "hypothetical" case is not so hypothetical. There are, however, occasions on which real estate brokers break this practice even against the expressed wishes of their sellers. See MacGregor v. Florida Real Estate Comm'n, 99 So. 2d 709, 712 (Fla. 1958) (alternative holding) (real estate commission may discipline broker for knowingly negotiating a sale to a Jew in violation of owner's wishes).

to their interest in more basic opportunities.[114] Places of public accommodation have been the first object of nonviolent demonstrations not because Negroes want equality there before equality in employment, housing, or voting, but because these places are peculiarly vulnerable to extralegal pressure.

Whatever the occasion for the demonstrations, a major legal contest will necessarily follow these extralegal attempts at desegregation. The courts cannot for long avoid testing the scope of the demonstrators' theories of state action.[115] Thus far the lower courts have managed to decide a number of cases,[116] but uniform treatment and coherent doctrine have been conspicuously absent. Typically, these cases have involved either the application of criminal ordinances and statutes prohibiting trespass or breach of the peace at the request of the proprietors or petitions by Negroes for affirmative relief from discrimination. Most of the courts have resisted the ultimate potential applications of *Shelley v. Kraemer*[117] and *Marsh v. Alabama*,[118] and the several decisions favoring Negro claims have relied on a random variety of formal state connections to impose standards of equal protection on private businesses.[119]

---

114. See, *e.g.*, ROSE, THE NEGRO IN AMERICA 24 (1948).

115. For recent discussions see Carl, *Reflections on the "Sit-Ins"*, 46 CORNELL L.Q. 444 (1961); Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555 (1951); Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 DUKE L.J. 315; *Legal Aspects of the Sit-In Movement*, 5 RACE REL. L. REP. 935 (1960); Comment, 6 VILL. L. REV. 218 (1961); Note, *Lunch Counter Demonstrations: State Action and the Fourteenth Amendment*, 47 VA. L. REV. 105 (1961).

The Supreme Court neatly avoided state action considerations in deciding the first sit-in case of the recent term, Boynton v. Virginia, 364 U.S. 454 (1960), and relied on a multiplicity of connections in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), but has granted certiorari in several others, *e.g.*, Garner v. Louisiana, 365 U.S. 840 (1961). A summary of the oral argument in *Garner* and its companion cases may be found in 30 U.S.L. WEEK 3125 (1961).

116. The following cases are relevant, combining what would traditionally be viewed as a privately made decision to discriminate because of race, in a place of public accommodation, with some involvement of formal state power to enforce the decision: Williams v. Hot Shoppes, Inc., 293 F.2d 835, 6 RACE REL. L. REP. 512 (D.C. Cir. 1961); Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960); Henry v. Greenville Airport Comm'n, 279 F.2d 751 (4th Cir. 1960); Williams v. Howard Johnson's Restaurant, 268 F.2d 845 (4th Cir. 1959); Whiteside v. Southern Bus Lines, 177 F.2d 949 (6th Cir. 1949); Valle v. Stengel, 176 F.2d 697 (3d Cir. 1949); Henderson v. Trailway Bus Co., 194 F. Supp. 423, 6 RACE REL. L. REP. 467 (E.D. Va. 1961); Griffin v. Collins, 187 F. Supp. 149 (D. Md. 1960); Slack v. Atlantic White Tower System, 181 F. Supp. 124 (D. Md.), *aff'd*, 284 F.2d 746 (4th Cir. 1960); Walker v. State, 103 Ga. App. 70, 118 S.E.2d 284 (1961); Drews v. State, 224 Md. 186, 167 A.2d 341 (1961); State v. Williams, 37 CCH Lab. Cas. 67515 (Baltimore Crim. Ct. June 10, 1959); State v. Fox, 254 N.C. 97, 118 S.E.2d 58 (1961); State v. Williams, 253 N.C. 804, 117 S.E.2d 824 (1961); State v. Avent, 253 N.C. 580, 118 S.E.2d 47 (1961); State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958); Briscoe v. State, 341 S.W.2d 432 (Tex. Crim. App. 1960); Randolph v. Commonwealth, 119 S.E.2d 817, 6 RACE REL. L. REP. 471 (Va. Sup. Ct. App. 1961).

117. 334 U.S. 1 (1948).

118. 326 U.S. 501 (1946).

119. See, *e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Boman

Uniformity of treatment may be a mirage. But we believe that a start toward coherence may be attempted through the approach we have outlined in the preceding sections. What remains here is to illustrate this technique in the area of public accommodations, once again through the use of hypothetical cases.

Case 20: The City of Chicago leases a small downtown lot to a man who pays a fair rental and who builds a small sandwich stand on the lot. This proprietor serves whites only. When several Negroes apply for service, and remain in their counter seats after being asked to leave, the proprietor complains to the police. The Negroes are convicted of criminal trespass in the state court.

Case 21: A department store does eighty per cent of the business in a small town; it sells some goods which are not available elsewhere in town; it serves whites only. Some Negroes refuse to leave the store when asked, and they are escorted to the street by salesmen who use a minimum of force; the Negroes sue the salesmen for battery. A state court sustains a demurrer to their complaint on the ground that the owner had a privilege to eject unwanted visitors.

Acquaintance with the Supreme Court's decisions suggests that the conviction in Case 20 might be reversed, but that the suit in Case 21 is doomed. The distinction would rest on the presence or absence of the requisite formal state connection. Closer attention to the interests at stake, however, might reveal a constitutional basis for exactly opposite conclusions.

The Negroes in Case 20 have an interest in obtaining a light refreshment and in sharing whatever associational advantages the facilities may have. Should further inquiry disclose the availability of other lunch counters, however, or the availability of other kinds of inexpensive eating establishments, their need to eat at this particular one becomes less substantial. Perhaps their deprivation is greater here than a denial of access to a penny arcade, but it is certainly less than denial of access to the store in Case 21, or denial of access to the only motel along a 100-mile stretch of highway. If a man can eat at Joe's, then his need to eat at Gus's across the street is not pressing.

On the other hand, the owner of the sandwich stand has a proprietary interest in controlling the use of property he has built from

v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960); Valle v. Stengel, 176 F.2d 697 (3d Cir. 1949).

his own earnings, reduced to the extent that the state has contributed to his facilities by making the lot available. The owner also has an economic interest in avoiding any potential loss of white customers which may result from his serving Negroes (also reduced to the extent that the state's willingness to lease at this location influences his business). Finally, if the owner waits on customers, his own associational preferences are relevant. If application of the equal protection clause forces him to serve Negroes, the impact on his associational interest is substantial; not as substantial as the impact of a similar decision on a one-man barbershop, perhaps, but certainly more substantial than the impact of such a decision on the store owners in Case 21, who do not wait on customers.

At this stage of analysis, before consideration of the question of local responsibility, the balance suggests that Case 21 should be decided for the Negro plaintiffs, while the conviction of the Negro would-be patrons in Case 20 might be sustained. Does the latter conclusion square with the result in *Burton v. Wilmington Parking Authority*?[120] We think it does; the extent to which the state's assistance to the sandwich stand proprietor reduces his personal claims does not compare with the importance of state aid in the *Burton* case. If the sandwich stand had been constructed and furnished by the city, as was true of the restaurant in *Burton*, the lessee's proprietary interest would be substantially reduced. If the stand were in the midst of state office buildings which would provide a captive clientele, the owner's economic risk from a nondiscriminatory policy would be less. If the stand were staffed by employees rather than the proprietor himself, his personal interest in choosing associates would be less. With all these changes, Case 20 would resemble the *Burton* case. Since the state has no legitimate interest of its own in discrimination which might make up for the reduced interests of the lessee, and since the interests of the excluded Negroes remain at least the same as in Case 20 itself, in the absence of a local remedy the balance now favors applying the equal protection clause.

The result which we reach in each of these cases is not affected by the manner in which the state may finally become involved at the tail end of each transaction. If the sandwich stand proprietor's policy did not offend the fourteenth amendment—if on balance

120. *Supra* note 119.

his interests deserve protection even though that conclusion offends potential Negro customers—then he should be free to call on the orderly process of law to uphold those interests. Conversely, if potential Negro customers merit constitutional recognition for their claimed right to buy from the store in Case 21, it should not matter that policemen were not involved in the store's unconstitutional conduct. The contrary conclusion not only resolves constitutional issues according to procedural fortuities; it encourages resort to violent self-help rather than to law enforcement officers and the courts.[121]

The availability of a local remedy may be as important in the constitutional balance as the availability of another lunch counter or department store in the same area. A public accommodations law, or a common-law duty of innkeepers—when conscientiously enforced—will serve the excluded minority at least as well as resort to a federal court.[122] The need for clarification of this very issue led three Justices to press for remand in the *Burton* case. A showing of local responsibility in promoting the national policy of racial equality may properly stay the hand of the federal judiciary.

The assertion of local prerogative—the interest of the community in making its own decisions to prefer one set of personal interests over another—is another matter. On the face of things, the absence of a public accommodations law and the presence of a criminal trespass law suggest only that the community has chosen to vindicate certain property interests at the expense of customers in general. But since the white majority is normally not excluded by the proprietors of these accommodations, there may be reason to suspect that the local decision reflects support for illegitimate

121. Yet, men who should know better continue to insist that *Shelley v. Kraemer* tolerates discrimination which is "effective" without police assistance, while proprietors who call on the police violate the fourteenth amendment. "Where private racial discrimination is effective without help from the government, then the principle of *Shelley v. Kraemer* has no application. But where the private racial discrimination cannot be implemented without governmental aid, then such aid is within the rationale of *Shelley v. Kraemer*, and is a violation of the Fourteenth Amendment." KONVITZ & LESKES, A CENTURY OF CIVIL RIGHTS 149 (1961).

122. For reference to the laws of twenty-six states which have extended protection beyond the common-law duty of innkeepers, see GREENBERG, RACE RELATIONS AND AMERICAN LAW 101–14 (1959); Governor's Comm. on Human Rights, State Laws and Agencies for Civil Rights (multilithed materials, State of Wisconsin, 1960). The unsatisfactory nature of ordinary civil and criminal remedies has been noted, however, *e.g.*, Van Alstyne, *A Critique of the Ohio Public Accommodations Law*, 22 OHIO ST. L.J. 201 (1961), and the trend is toward the use of administrative authority armed with equity powers enforceable through contempt proceedings. See N.Y. EXECUTIVE LAW §§ 290–98; OHIO REV. CODE ANN. §§ 4112.01–.08 (Page Supp. 1960). For a review of administrative enforcement of antidiscrimination legislation, see Note, 74 HARV. L. REV. 526 (1961).

distinctions based on race rather than legitimate preferences for proprietary rights over customer rights.[123] Such a conclusion is unavoidable when, for example, a Southern state legislature abolishes the common-law duty of innkeepers as a part of a package of white supremacy legislation.[124] The interest in local decision-making prerogative will not stretch so far.

Conclusion

The *Burton* case furnishes our closing theme. In his opinion for the court, Mr. Justice Clark eschewed a unitary formula for state action:

> Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is "an impossible task" which "this Court has never attempted." . . . Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.[125]

Such caution is well advised. But it is galling to those who yearn for certainty in their constitutional law. When the Court stalwartly insists that "private conduct abridging individual rights does no violence to the Equal Protection Clause,"[126] while at the same time nimbly fetching enough connections to treat the state as the culprit, the Court exposes itself to the exasperation of its own members:

> The Court's opinion, by a process of first undiscriminatingly throwing together various factual bits and pieces and then undermining the resulting structure by an equally vague disclaimer, seems to me to leave completely at sea just what it is in this record that satisfies the requirement of "state action."[127]

---

123. The intrinsic bias of seemingly equal laws has been remarked upon by Anatole France: "The law, in its magnificent equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

124. The proliferation of antitrespass statutes (see the tables of contents to *Race Relations Law Reporter* under "Legislatures" from vol. 5, no. 2 to present) in southern states on the occasion of sit-in demonstrations equally suggests animus directed against Negroes, rather than a reasoned preference of proprietary over customer interests. For reference to statutes rejecting the common-law duty of innkeepers (all from border or Deep South states and all within the last decade), see Greenberg, Race Relations and American Law 97 n.67 (1959).

125. 365 U.S. 715, 722 (1961).

126. *Ibid.*

127. *Id.* at 728 (Harlan, J., dissenting).

That is the dilemma. Shall we choose formulas in the hope of achieving uniform and predictable results, or shall we resign ourselves to a continual struggle with unruly legislative facts? Thus far the Supreme Court has, more often than not, chosen to speak the language of formula, whatever has been its inner motivation for deciding. But the bankruptcy of the formulas which have been announced to date has apparently caused the Court to avoid deciding state action cases rather than face the formulas' implications. The result has been the creation of a climate of uncertainty. The state action cases, at least since *Smith v. Allwright*,[128] have fulfilled Holmes' prophecy: "Certainty generally is illusion, and repose is not the destiny of man."[129]

In choosing the daily encounter with particulars, we are mindful of the pitfalls on that road. The Court risks more than its own convenience. It risks the consequences of widespread public awareness of its true function of selecting values for constitutional preference. When the Court tells us that it is the Constitution which commands, we stand still for the consequences; when the Court tells us that on balance the interest in equal treatment outweighs the interest in associational choice, will we be so generous?

In between, there is another possibility: the Court may reach its decisions by "sifting facts and weighing circumstances,"[130] but announce those decisions in the name of a formula. We prefer to hope that the Court will reject this policy because it is easy only in the short run. For one thing, formulas tend to catch up with the Court when they are empty. But more serious are the consequences of such a failing of candor for the rule of law. Law does not rule when the motivations behind judicial decisions are kept hidden. Reasoned opinions announce the law only when the stated reasons truly reflect the real reasons for deciding. Any of the choices open to the Court involves a risk; we prefer the risks of candor to those of deception.

128. 321 U.S. 649 (1944).
129. Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 181 (1920).
130. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).